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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ROBIN JOY SHAHAR,

Petitioner,

—v.—

MICHAEL J. BOWERS, individually and
THURBERT E. BAKER, in his official capacity
as Attorney General of the State of Georgia,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF *CERTIORARI*

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186 pp

QUESTIONS PRESENTED

1. Was the *Pickering v. Board of Education*, 391 U.S. 563 (1968), balancing test improperly distorted below, when the court of appeals failed to give particularized consideration to petitioner's interests and failed to find the creation, celebration and sustenance of her most important personal relationship protected by, and at the core of, one or both aspects of the fundamental right of association?

2. Must a court, for purposes of the *Pickering* test, assess the reasonableness and weight, if any, of a public employer's fears of disruption based only on the facts the employer knew at the time the employment decision was made, specifically excluding from its consideration any uninvestigated, factually unfounded speculation and any after-acquired evidence?

3. In the *Pickering* context, is equal protection jurisprudence relevant to determining the legitimacy and weight, if any, of a public employer's fears of disruption, when the employer relied on the employee's belonging to an unpopular group (here, lesbians and gay men) to judge her behavior more harshly than the behavior of others?

PARTIES TO THE PROCEEDING

The caption of the case includes the names of all parties.

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Robin Shahar respectfully petitions for a writ of *certiorari* to review the judgment, and post-judgment motion ruling, of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the *en banc* court of appeals denying rehearing and denying Shahar's motion to supplement the record is reported at 120 F.3d 211. App.1a. The decision of the *en banc* court on the merits is reported at 114 F.3d 1097. App.10a. The panel decision of the court of appeals is reported at 70 F.3d 1218, App.94a, and vacated at 78 F.3d 499, App.93a. The district court's decision is reported at 836 F.Supp. 859. App.131a.

JURISDICTION

On August 1, 1997, the court of appeals denied Shahar's timely petition for rehearing. App.7a. The judgment sought to be reviewed was entered on May 30, 1997. App.10a. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part:

> Congress shall make no law . . . prohibiting the free exercise [of religion]; or abridging the freedom of speech . . .; or the right of the people peaceably to assemble . . . .

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This action challenges former Georgia Attorney General Michael Bowers' refusal to allow Robin Shahar to join the Georgia Department of Law (the "Department") as an entry-level staff attorney, despite a previously proffered and accepted employment offer. Bowers dismissed Shahar when he learned that she was a lesbian and that she planned to celebrate a religious wedding with her female partner. Shahar contends that Bowers' action violated her First Amendment rights and the Equal Protection Clause, and that the court below -- contrary to this Court's prior guidance -- distorted important, broadly applicable propositions of constitutional law in affirming summary judgment for Bowers.

Factual Background

Shahar attended Emory University's School of Law, where she served as a notes editor on the law review and graduated sixth in her class. After her second year, she worked as a summer law clerk for the Department. That clerkship led to an offer of permanent employment, with Bowers writing to Shahar that "[m]y staff and I were very pleased with your performance." R1-2-Exh. A.[1] In November 1990, Shahar accepted the offer. R1-2-Exh. B.

In 1990, Shahar and Francine M. Greenfield began preparing for a Jewish wedding ceremony to make a permanent, life-long commitment to one another. The couple first met in 1986, began dating, and eventually began living together. By 1990, their relationship had deepened to the point where Greenfield was the one "person with whom [Shahar] wanted to share [her] life in the most intimate and committed way[.]" R2-34-Shahar Dec. ¶9.

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[1] Record citations are to the record volume, document number, and subpart and/or page number; deposition transcripts are cited by deponent's name and page number.

Both women are devout Jews and active members of a Reconstructionist synagogue in Atlanta. Shahar 6-9. Their commitment ceremony was to be performed by their rabbi, Sharon Kleinbaum, and take place before invited family, friends, and members of their synagogue. By participating in the traditional *kiddushin*[2] ritual, Shahar and her partner sought to "create a Jewish family" and to celebrate that union within their religious and personal spheres. R2-34-Shahar Dec. ¶¶5-11. At the same time, they realized "that our ceremony would have no legal significance whatsoever." *Id.* at ¶8. (In particular, Shahar never sought any kind of benefit or approval of her relationship from the Department.) The two women eventually chose July 28, 1991, as the date for this ceremony.

In mid-June of 1991, various Department managers learned skeletal information about Shahar's wedding plans. These managers discussed the information with Bowers, who then decided to terminate Shahar's employment. As Bowers testified, the entire universe of information about Shahar's plans on which he based his decision consisted of:

> (a) in a brief phone conversation about starting work, Shahar told Deputy Attorney General Robert Coleman that she was getting married later in the summer, traveling to Greece after the wedding, and changing her last name;[3]
>
> (b) Department attorney Susan Rutherford, who had spoken with Shahar about her wedding preparations and had met Shahar's partner, told Jeffrey Milsteen,

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[2] This Hebrew word translates into English as "marriage" or "sanctification." Kleinbaum 53; Friedlander 50.

[3] In July 1991, petitioner's last name was legally changed from Brown to Shahar; some of the record evidence in this case uses her prior surname. Greenfield also changed her last name to Shahar, which means "seeking God" in Biblical Hebrew. Shahar 23.

a senior assistant attorney general, that the wedding was with another woman;

(c) Shahar, when accepting her job offer, had indicated on a confidential personnel form seeking family background information for conflict-of-interest purposes that her "future spouse's name" was "Francine M. Greenfield" and that Greenfield worked for Georgia State University, R2-34-Plaintiff's Material Facts, Exh. A; Bowers 27, 29, 33-34;

(d) Bowers had information "that there are invitations being sent out or had been sent out and . . . somebody on staff or more than one had either received invitations or were to," Bowers 38;

(e) he also had a vague and inaccurate indication, "something to the effect [that it was to be] a big or church wedding, I can't remember which," *id.*; and

(f) Bowers knew "that this was to be a wedding performed by a rabbi, I think from New York," Bowers 40.

See generally Bowers 29-40, 50-56. Among the many gaps in his information, Bowers did not know where the ceremony was to take place (South Carolina), did not "have any idea of the number of individuals that would be invited," and did not know any other facts relevant to the ceremony's "public or private" nature. Bowers 60-61.

Bowers first learned that Shahar was a lesbian through the information summarized above. Bowers 67-68. Likewise, the committee that recommended hiring Shahar to Bowers in the fall of 1990 had not known her sexual orientation. Milsteen 25-26, 38.

Bowers and his staff, aside from talking and speculating among themselves, made only one inquiry for information outside the Department: someone called Georgia State University to confirm that Francine Greenfield was a woman.

Bowers 55-56. Internally, Bowers asked two Jewish attorneys for their opinions about Judaism and "homosexual marriages." Bowers 40, 50.

Until Shahar was handed her letter of dismissal by Bowers' subordinates, who were under instructions not to discuss anything with her, Coleman 88, she never knew that her personal life was the focus of attention within the Department or that her employment was at risk. The July 9, 1991, dismissal letter from Bowers to Shahar stated in full:

> I regret to inform you that I must withdraw the State Law Department's offer of employment which was made to you in the fall of 1990, which was to commence on September 23, 1991, to serve at my pleasure. This action has become necessary in light of information which has only recently come to my attention relating to a purported marriage between you and another woman. As the chief legal officer of this state, inaction on my part would constitute tacit approval of this purported marriage and jeopardize the proper functioning of this office.

R1-2-Exh. D. Shahar was shocked by the letter, and asked to speak with Bowers to discuss the matter, but she was denied that opportunity. Bowers 70-72.

According to their deposition testimony, Bowers and his deputies had decided -- before the ceremony, long before her starting date, and with no knowledge of any public statements or activity -- that Shahar was thrusting her committed lesbian relationship before the eyes of the general public and into her professional life, and that she was making strong political statements through her upcoming religious marriage. *See* Bowers 41-42, 60-66; Manis 37, 52.

In particular, Bowers viewed "[j]ust the fact" of the upcoming religious marriage as a political statement: "To me it says that we are not going -- the people participating, Ms. Shahar and Ms. Greenfield, were saying in effect, we don't

believe in, respect, or don't plan to uphold the law of marriage in this state." Bowers 62-63. In addition, to Bowers "[j]ust the fact of participating in a homosexual marriage constitutes taking a stance on the issue of the application of the [Georgia sodomy statute] to homosexuality and such relationships[.]" Bowers 79. Bowers guessed, with no actual knowledge of Shahar's sexual behavior nor any facts about lesbian sexual practices in general, that the public would share his belief that Shahar had violated the sodomy law and that such a public perception would interfere with her job performance. Bowers 69, 79-81. Bowers assumed that employing Shahar would make it difficult for the Department to handle "lots of kinds of cases" with gay or lesbian parties, including "child custody, deprivation cases" involving "a homosexual couple." Bowers 42-43. Finally, Bowers also believed that, "by engaging in a homosexual marriage," Shahar had shown that she lacked "good judgment." Bowers 83.

In fact, Shahar has never made any statement about Georgia's marriage laws. Shahar never sought a marriage license, or made any attempt to transform her purely religious and personal relationship into a legal (civil) marriage. Shahar 5; R1-2 ¶10; R2-34-Shahar Dec. ¶19. As Bowers concedes, Shahar broke no law in celebrating her religious and personal commitment to another woman. Bowers 63. Nor is there any evidence that Shahar has broken Georgia's sodomy law. Bowers 69.

Georgia's consensual sodomy offense prohibits oral or anal sex for any couple, heterosexual or gay. *See* Ga. Code Ann. §16-6-2 (1997). The Department has handled only three cases involving the law's enforcement in recent decades, including one against a married man for sodomy with his wife. R2-35-Mem. 8-10. And Bowers' office submitted court papers in that heterosexual case emphasizing that "[t]he personal conduct of [the state's] counsel is no more relevant to [their work on a case challenging the validity of

the consensual sodomy law] than the personal conduct of Petitioner's counsel or the Court." R2-35-Exh. B at 2; *id.* at 3-4 (information about Department attorneys' private, consensual sexual behavior "has nothing to do with professional impropriety" and is "wholly irrelevant" to their professional role).

Proceedings Below

1. District Court Disposition. The district court had jurisdiction under 28 U.S.C. §§1331 and 1343. In that court, Bowers moved for summary judgment on all claims. Shahar cross-moved on her intimate association, expressive association, and free exercise claims.

Applying the criteria described in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the district court held that "plaintiff's relationship with her female partner constitutes a constitutionally-protected intimate association." App. 137a. It found that "plaintiff pursued her desired association only at the price of her desired employment." *Id.* The court, however, found Bowers' concerns to be "sufficiently supported" and granted him summary judgment on the intimate association cause of action. App.140a-42a. The district court also ruled in Bowers' favor on the free exercise and equal protection claims. The court declined to rule separately on expressive association.

2. Panel Disposition. On appeal, a panel of the Eleventh Circuit reversed the judgment for Bowers on Shahar's freedom of association claims, and remanded to the district court for consideration of those claims under strict scrutiny. App.94a-95a, 106a-07a. The panel affirmed summary judgment for Bowers on the free exercise and equal protection claims.

The panel unanimously agreed with the district court that Shahar's relationship was a constitutionally protected intimate association, App.94a-95a, and found the relationship to be a protected expressive association as well, App.110a,

127a. The panel also agreed that, because Bowers dismissed Shahar for her protected associational activity, his decision must be given meaningful constitutional review. Judge Kravitch, who concurred in part, dissented from the use of strict scrutiny and applied the *Pickering* balancing test instead.

After reviewing the undisputed facts under the *Pickering* standard, Judge Kravitch concluded that "Shahar's constitutional interest in pursuing her intimate association outweighs any threat to the efficient operation of the Georgia Department of Law"; thus, she would have granted summary judgment to Shahar. App.126a. Judge Kravitch emphasized that "[t]he relationship celebrated through Shahar's and Greenfield's commitment ceremony is close to the core of the constitutional right to intimate association[.]" App.123a. By contrast, Judge Kravitch found Bowers' justifications devoid of factual support. App.124a-26a. The record indicated instead that Bowers relied on dubious assumptions and illegitimate government concerns:

> Shahar's commitment ceremony and relationship were not, before the inception of this case, thrust into the public domain. Even if members of the public were to become aware of and misunderstand the asserted status of the relationship between Shahar and her partner, it is questionable whether they would infer that the Department, by employing Shahar, was acquiescing in the legally legitimate status of the union. Shahar neither violated Georgia's laws pertaining to marriage nor attempted to avail herself of any legal rights or privileges reserved for legally married people. And there is no evidence that Shahar violated Georgia's sodomy law. Catering to private prejudice is not a legitimate government interest.

App.125a-26a (footnote omitted)(citations omitted).

3. *En Banc* Disposition. The Eleventh Circuit granted Bowers' application for rehearing *en banc*. The *en banc* court then affirmed the district court's summary judgment for Bowers. App.10a. Four judges dissented and would have granted summary judgment to Shahar on her intimate association claim. App.56a, 73a. Three dissenters also would have granted her judgment on the expressive association claim. App.56a.

The majority expressed "doubt" that the rights of intimate or expressive association protect Shahar's relationship, without ever analyzing Shahar's relationship under the clear standards for protected intimate and expressive associations that this Court has established. App.11a-12a. The court apparently viewed Shahar as asking for the creation of new rights. App.11a n.2.[4]

Nevertheless, the majority "assume[d] (for the sake of argument only) that Plaintiff has these rights" and proceeded to assess the case under *Pickering*. App.13a. Although its opinion purports at one point to accord the "claimed associational rights . . . substantial weight[,]" App.28a, the majority never considered the nature of the interests on Shahar's side of the balance and thus never engaged in a case-specific weighing of her particular First Amendment interests. According to the majority,

> A person often knows that "x" outweighs "y" even without first determining exactly what either "x" or

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[4] Contrary to the opinion's implications, this case is not about any "right of same-sex marriage" that would open civil marriage to gay couples, *cf.* App.11a n.2, or about any other claim that government must affirmatively "further" Shahar's association, App.12a. Instead, the case seeks to protect individual liberty by preventing the government from punishing (*e.g.*, by revoking a state job) or otherwise interfering with individual associational freedom that takes place in a citizen's personal and religious life.

"y" weighs. And it is this common experience that illustrates the workings of the *Pickering* balance.

App.27a.

In concluding that Bowers prevailed under this abstract balancing, the court relied upon facts (some inaccurately described) that Bowers did not know at the time of his decision[5] and upon occurrences that happened long after the termination.[6] App.23a-24a, 29a, 31a, 35a n.24. The majority viewed such information as "evidence of the reasonableness of the Attorney General's concerns . . . *at the time he made his decision*," App.29a n.21 (emphasis added); Shahar's request for reinstatement, the court said, made after-acquired evidence "especially relevant" at even the liability stage. *Id.*

Furthermore, the majority found that Bowers' predictions of future disruption were "reasonable" and gave those

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[5] For example, the opinion cites that the two women "openly" "sought and received the married rate on their insurance" and "together, own the house in which they cohabit," facts unknown to Bowers in July 1991, as evidence that Shahar "hold[s] herself out" as married in a way that might interfere with the Department's work. App.29a. The lower insurance rate, however, was secured in a private conversation between Shahar and her insurance agent, when she explained to him the religious, nonlegal nature of her ceremony and asked whether the lower, "no unmarried females" rate would be possible. Shahar 21-22, 71. As to the home ownership, the opinion does not indicate how that fact could possibly represent "holding herself out" as married.

[6] The opinion, for example, takes the position that "the Attorney General's worry about his office being involved in litigation in which Shahar's special personal interest might appear to be in conflict with the State's position has been borne out in fact," citing cases from 1993-96. App.24a n.16. The opinion provides no explanation or evidence, however, to show that Shahar had a "special personal interest" that might relate to any of the cases. The only possible connection between Shahar and those matters is a shared sexual orientation with some of the interested parties.

predictions controlling weight, despite his scant concrete information and the lack of any input from Shahar herself as to how she would conduct herself during and after the wedding ceremony and as a staff attorney. App.26a n.18. ("We cannot say that the Attorney General acted unreasonably in relying on this [limited] information or in acting without his having spoken with Shahar.").

Finally, the majority endorsed Bowers' reliance on "perceived public hostility" toward Shahar. App.33a. The court gave considerable weight to Bowers' selective fear of possible public perceptions about a consensual sodomy law violation, and his selective use of the Department's history in upholding that law (emphasizing *Bowers v. Hardwick*, 478 U.S. 186 (1986)), to justify firing this lesbian attorney. The court specifically rejected Shahar's argument that Bowers' adverse judgments about, and reliance on potential "public reaction" to, her behavior and capabilities as a lesbian -- while simultaneously dismissing the relevance of potential "public reaction" to the personal lives and behavior of heterosexual Department attorneys -- rendered his concerns illegitimate under equal protection jurisprudence and thus entitled to no weight in his favor under *Pickering*. App.36a & n.26 ("Neither *Romer* nor any other case in which a state government (acting as sovereign) violated the Equal Protection Clause of the Fourteenth Amendment by giving effect to private prejudice, *see e.g. Palmore v. Sidoti*, 104 S.Ct. 1879 (1984), convinces us otherwise.").

Judge Tjoflat, specially concurring, concluded that the majority erred as a matter of law by avoiding the constitutional question of whether Shahar's relationship is protected by intimate and/or expressive association. In his view, "the court must describe qualitatively the constitutional right it is placing on the scale in order to determine whether, on balance, the government's interest is to prevail." App.40a. Moreover, Judge Tjoflat wrote, if Shahar's intimate associa-

tion were entitled to full constitutional protection,

> a court engaged in a *Pickering* balance would either (1) refuse to consider as government interests the public perception of such a relationship or any state policy positions hostile toward that relationship, or (2) conclude that such governmental interests do not prevail in the balance.

App.50a-51a.

In three dissenting opinions joined reciprocally, Judges Godbold, Kravitch and Barkett concluded that "Shahar enjoyed rights of intimate association and expressive association and that the Attorney General violated those rights[.]" App.56a. The dissenters criticized the majority for "discount[ing] Shahar's interests." App.90a. The Godbold opinion further emphasized:

> If the Attorney General had made reasonable investigation this case might never have arisen. . . . The Attorney General walled himself off, forbade comment or inquiry by staff members who met with Shahar, and terminated the agreement with Shahar on his erroneous perception of the association that she was asserting. Whatever his views about possible adverse effects on his office, he did not act reasonably.

App.64a-65a. Judge Kravitch similarly criticized the lack of factual support and investigation behind Bowers' decision.[7]

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[7] App.70a ("To the extent that Bowers concluded Shahar would disrupt the office because her relationship could be interpreted as a political statement, he did not act reasonably. Shahar's association with her partner, although not secret, was private. Shahar's religious marriage ceremony was by invitation and held in another state. It was neither announced in the newspapers, nor otherwise reported publicly. Further, Shahar never claimed she had contracted a legal marriage, nor did she (continued...)

She stressed that, under *Waters v. Churchill*, 511 U.S. 661 (1994)(plurality), employer predictions of disruption must be reasonably arrived at to be given significant weight on the employer's side of the *Pickering* balance. App.69a-70a.

The fourth dissenter, Judge Birch, explained that each of Bowers' "predictions . . . is based on a series of assumptions and unsupported inferences about Shahar *because of her status as a homosexual*." App.74a (emphasis in original).[8] Judge Birch thus reasoned,

> With *Romer* in the balance, the [*Pickering*] scales tip decidedly in favor of Shahar because Bowers's interests are not a legitimate basis for infringing Shahar's constitutionally-protected right of intimate association.

App.73a. Echoing that view, Judge Kravitch wrote that "animosity toward gay people is an illegitimate purpose for state policy," in the employment context as in others, "and thus, to prevail in the balancing of interests, Bowers must cite more than perceived, public distaste for homosexuals." App.72a.

4. Disposition of Rehearing Petition and Motion. Shahar filed a petition for rehearing, arguing that the *en banc* court had erred in its legal conclusions and that, in addition, new evidence made rehearing appropriate. The court denied Shahar's petition. App.7a.

Shahar also moved for judicial notice of, or otherwise

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[7] (...continued)
challenge her legal ineligibility for civil marriage. Bowers could and should have ascertained all of these facts . . . .").

[8] Judge Birch also concluded, "The distinction that the majority draws between Shahar's status as a homosexual and her conduct in entering a homosexual marriage . . . is truly a distinction without a difference, in my opinion. It is a matter of simple logic that only *homosexuals* would enter into a *homosexual* marriage." App.74a n.2 (emphasis in original).

to supplement the record with, the new information that Bowers had announced a few days after the *en banc* ruling. In responding to the motion, Bowers raised "no objection to the Court's including the proffered information in the record[.]" Response of Attorney General Baker and Former Attorney General Bowers at 7. The "proffered information" consisted of Bowers' admission that -- while Attorney General and still married to his wife -- he had participated in a decade-long, adulterous affair with a woman who had been employed in the Department. *See id.* at 1-2 & Exh. 1; Adams Dec. & Exh. A-B. Adultery and fornication, like consensual oral or anal sex for all couples, are illegal in Georgia. *See* Ga. Code Ann. §§16-6-18 & 19 (1997).

The court of appeals refused to take judicial notice of the facts admitted by Bowers, or to allow Shahar some other means of supplementing the record. Three judges dissented, emphasizing:

> [Bowers argued] that Shahar could not function as a trustworthy member of his staff because she likely had a conflict of interest with respect to Georgia's sodomy laws. Considering that Bowers admits that, perhaps at the very time he fired Shahar, he was also breaking Georgia's adultery and fornication laws, his justification is entitled to no weight. At the very least, Bowers' justification evinces discrimination against Shahar solely on the basis of her status as a homosexual, since Bowers did not make the same assumption about conflict of interest with respect to himself or other lawyers in his department.
>
> Judicial notice is obviously appropriate . . . . Surely this court can know the content of a statement that is relevant, accurate because made by Bowers himself, and known to millions.

App.8a-9a.

REASONS FOR GRANTING THE WRIT

The decisive legal rulings below conflict with the clear principles this Court has established to govern public employee cases, the scope of freedom of association, and equal protection issues. In addition, the court of appeals' many errors on important constitutional law questions have allowed an unjust state action to stand. According to the court below, the Constitution's guarantee of associational freedom does not prevent a government employer from firing a lesbian simply because she plans to enter into and privately celebrate, within her religion, a committed personal relationship with her partner.

The ruling below discarded critical aspects of the *Pickering v. Board of Education*, 391 U.S. 563 (1968), balancing test and thereby greatly diminished the constitutional rights of not just Shahar, but all public employees and contractors. First, the court erroneously held that it could avoid determining whether a *Pickering* plaintiff has constitutionally protected interests, and that it could fail to analyze and weigh the precise nature of the employee's claimed First Amendment activity. In fact, this approach precludes any real balancing, which is the essence of the *Pickering* test. Here it resulted in an underweighting of Shahar's protected interests and an erroneous end result. In giving too little attention and weight to Shahar's side of the balance, the court of appeals also failed to heed this Court's criteria for identifying protected intimate and expressive associations, as set forth in *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537 (1987), and *Roberts v. United States Jaycees*, 468 U.S. 609.

Second, the decision below improperly altered the focus of the *Pickering* test from what the employer knew at the time of the actual decision, to an analysis that incorporates all kinds of uninvestigated speculation and after-acquired

evidence. It subverts the teaching of *Waters v. Churchill*, 511 U.S. 661 (plurality), and other decisions of this Court that fears of disruption can be weighed on the employer's side of the *Pickering* scale only if those fears are *reasonable* in light of the facts known at the time and the degree of investigation conducted.

Third, the *en banc* majority weighed illegitimate state interests in Bowers' favor, contrary to the constitutional requirement that public employee discharges, like all other government actions, be justified on "legitimate grounds." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). To condone Bowers' reliance on "perceived public hostility," App. 33a, and on discriminatory assumptions, the court of appeals erroneously viewed government-as-sovereign equal protection cases as irrelevant to the *Pickering* context. The majority's flawed effort to cabin equal protection principles should be reviewed and reversed by this Court, to make clear that belonging to an unpopular group, defined by "controversial" or "discomforting" personal characteristics, cannot trigger greater, selective limitations on public employees' First Amendment activities.

I. The Ruling Below, Contrary To This Court's Prior Decisions, Deletes A Crucial Step In The *Pickering* Test And Gives Too Little Protection To Associational Rights

A. By Failing To Consider The Employee's Specific Interests In Constitutionally Protected Activity, The Ruling Below Subverts The Central Tenet Of *Pickering* Balancing

As explained and applied by this Court, the *Pickering* standard requires a "particularized" inquiry to reach "the most appropriate possible balance of the competing interests." *Connick v. Myers*, 461 U.S. 138, 150 (1983). A

careful, fact-intensive balance must be struck in each case between "the interests of the [employee], as a citizen" and "the interest of the State, as an employer[.]" *Pickering*, 391 U.S. at 568. Thus, "the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." *Connick*, 461 U.S. at 150. The closer the employee's activity is to the "'highest rung of the hierarchy of First Amendment values,'" *id.* at 145 (citation omitted), the "stronger [the] showing" the employer will have to make to justify punishing that activity. *See id.* at 152; *see also Waters*, 511 U.S. at 674.

The court of appeals short-circuited the "particularized balancing" that is central to *Pickering* by simply assuming that Shahar's activity was protected and never assessing the facts and interests at stake from her perspective. App.17a, 28a.[9] In some types of cases an assumption of constitutional protection may be to a plaintiff's advantage, but in the *Pickering* context it impermissibly deprives the plaintiff of the reviewing court's gaining any palpable sense of the magnitude of what is at stake for the employee.

> As Judge Tjoflat's opinion explains,
>
> When a court engages in *Pickering* balancing, it must identify the constitutional source of the right the employee exercised and assign weight to that right. Otherwise, balancing cannot occur. It cannot occur any more than the local butcher can weigh five pounds of hamburger without placing a five pound weight on the other side of the scale.

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[9] To the extent the majority opinion even mentions the facts deemed relevant by Shahar, it examines those facts only from the perspective of Bowers' asserted interests as the employer. *See* App.28a-30a. The court never makes explicit why *Shahar* might value -- and the First Amendment might protect -- her freedom to select her life mate, celebrate that relationship in a religious and personal way, and lead her private, off-duty life as she sees fit.

App.43a. Although the majority below is correct that a person can know "'x' outweighs 'y' even without first determining exactly what either 'x' or 'y' weighs[,]" App.27a, both "x" and "y" must at least be "weighed" -- *i.e.*, picked up and held -- to compare one to the other. In this case, the court failed to pick up and carefully consider the magnitude of the facts and interests as presented from Shahar's perspective, in light of the values that underlie the fundamental rights of intimate and expressive association. With that alteration to the *Pickering* test, it was impossible for the Eleventh Circuit to reach the case-specific result that this Court has required based on the "most appropriate possible balance of the competing interests." *Connick*, 461 U.S. at 150.

The *en banc* court of appeals took the balancing out of *Pickering*. Because the decision below so radically altered the *Pickering* test, a test all public employees and contractors depend on to safeguard their First Amendment rights, and that alteration led to the wrong result here, this Court should grant review and correct the Eleventh Circuit's error.

B. The Ruling Below Departs From *Roberts* And *Rotary Club* In Its Approach To Whether The Right Of Association Shields A Particular Relationship

Moreover, the court of appeals did not simply assume, without deciding, that Shahar had some First Amendment protection -- it expressed "considerable doubt" that the activity that triggered her dismissal was protected by the rights of intimate or expressive association. App.11a. As stated by the majority, those doubts rest on significant misunderstandings of the proper standards for determining whether associational activity enjoys First Amendment protection. The court's erroneous approach led to a devaluation of Shahar's core First Amendment activity and will similarly constrict freedom of association for others if left uncorrected.

1. Shahar's Deep, Personal, Exclusive Partnership Exemplifies The Characteristics Of A Centrally Protected Intimate Association

As this Court has explained, intimate associations are a necessary, "intrinsic" building block for the development of individual beliefs and identity, and are protected by the First Amendment "because of the role of such relationships in safeguarding" individual self-definition. *Roberts*, 468 U.S. at 617-20; *Rotary Club*, 481 U.S. at 545-47. Specific intimate association claims must be evaluated by "a careful assessment of . . . [the] relationship's objective characteristics[.]" *Roberts*, 468 U.S. at 620. As *Rotary Club* summarizes:

> Of course, we have not held that constitutional protection is restricted to relationships among family members. We have emphasized that the First Amendment protects those relationships, including family relationships, that presuppose "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Roberts v. United States Jaycees*, *supra* at 619-20 . . . . In determining whether a particular association is sufficiently personal or private to warrant constitutional protection, we consider factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship.

481 U.S. at 545-46. Shahar's choice to "enter into and maintain" a committed, exclusive, familial relationship with her partner by participating together in a religious and personal union falls at the most intimate, most protected end of the "spectrum . . . of personal attachments." *See Roberts*, 468 U.S. at 617, 620.

The court of appeals, however, misread the controlling case law and indicated that "the culture and traditions of the Nation" are dispositive in determining whether the right of intimate association applies to a given relationship. App.11a & n.2; *see also* App.45a-46a (Tjoflat, J., concurring). This perspective confuses the historical inquiry that can play a part in the initial or general identification of a fundamental right, with the functional criteria that this Court has clearly articulated for assessing whether a present-day association is of the type or "*kind* of private or personal relationship" that the established First Amendment right of intimate association protects. *Rotary Club*, 481 U.S. at 547 (emphasis added).

Indeed, even when *Roberts* discusses the "critical role" these "kinds of personal bonds" have played in our history, it emphasizes that such relationships "foster diversity" and protect individual autonomy:

> [T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.

468 U.S. at 618-19. Given that theoretical foundation, it would be completely at odds with First Amendment principles to say that the constitutional protection granted to specific relationships depends on their historical prevalence, popularity, or conformance with "mainstream" culture.

2. Shahar's Cultural, Social and Religious Activity Also Constitutes Core Expressive Association

Likewise, the court of appeals portrayed the right of expressive association inaccurately and in too cramped a

fashion. The decision below makes that right co-extensive with and inseparable from Shahar's free exercise claim. App.11a. Even while filling its opinion with examples of how Bowers could have interpreted Shahar's expression as conveying a meaning beyond its religious significance, the majority simultaneously discounted any expressive association protection because "[p]laintiff's religion requires a woman neither to 'marry' another female . . . nor to marry at all[.]" App.11a; *see also* App.30a n.27 (stressing that "the Attorney General did not revoke Shahar's offer because of her religious affiliation").

Such facts have no bearing on the expressive association claim. It is undisputed that Shahar was sincerely motivated by and sought to express religious convictions, and that she also sought to express other ideas believed in by the couple and those closest to them. As this Court has held, but the decision below ignored:

> According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

Roberts, 468 U.S. at 622 (citations omitted). In organizing and celebrating a "Jewish, lesbian-feminist, out-door wedding," App.29a, with invited guests, Shahar and her partner were communicating their commitment to one another, their commitment to Judaism, and the value that they, their culture, and their supportive family and friends place on this relationship. By continuing to live, without hiding, in that devoted lesbian relationship -- with reinforcement from the

couple's religious and personal communities but completely apart from the civil institution of marriage -- Shahar communicates the relationship's significance in an ongoing way. R2-34-Shahar Dec. ¶¶5-9. *Cf. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 570 (1995). This cultural, social and religious communication through associational activity lies at the heart of the right to expressive association.

Moreover, both Bowers and the court of appeals hinge their actions on Shahar having made, in their view, a political or public statement through her relationship. *See, e.g.*, App.29a; *supra* at 5-6. That very reasoning should estop any argument that the right of expressive association does not protect Shahar's activity. While Shahar contends she expressed a "'private point[] of view,'" *see New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988)(citation omitted), and Bowers transforms that into a highly public and political statement, either version properly triggers the strong shield of the First Amendment. This Court should correct the mischaracterization below that Shahar's expression had to be *mandated* by her religion, embodying only religious and no other kinds of ideas, to fall within the broad right of expressive association.

II. The Court of Appeals Further Departed From *Pickering* And Its Progeny By Considering Uninvestigated Speculation And After-Acquired Evidence To Support The Employer's Asserted Interests, Instead Of Examining The Facts The Employer Knew At The Time Of The Decision

In another error that unjustly erodes public employees' constitutional rights and led to a wrong result here, the decision below inappropriately expands the information that can be brought to bear on the employer's side of the *Pickering* balance. The court of appeals' task was to determine

whether the actual employment decision Bowers made on July 9, 1991, violated the First Amendment. However, instead of focusing on what Bowers knew at that time to determine the reasonableness and weight of his disruption fears, the majority relied upon: (a) uninvestigated, factually unfounded speculation about Shahar's planned activity and about how Shahar would conduct herself as a staff attorney; (b) information acquired only through discovery in this case; and (c) events that transpired long after Bowers' decision. App.23a-31a.

As this Court stressed in a related context, "[t]he employer could not have been motivated by knowledge it did not have" at the time of a contested employment action. *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 360 (1995). Thus, when a court considers the interests of a government employer under the *Pickering* test, it must assess those interests from the perspective of the facts the employer knew at the time of the decision. *See, e.g., Pickering*, 391 U.S. at 570-72 (examining the evidence the Board had before it at the time of its final decision); *see also Board of County Comm'rs v. Umbehr*, 518 U.S.__, __, 116 S.Ct. 2342, 2352 (1996).

Of course, a court can consider a public employer's "reasonable predictions of [future] disruption" based on the facts known at the relevant time. *Waters*, 511 U.S. at 673; *see also Connick*, 461 U.S. at 154 (weighing concerns about possible disruption "which [the employer] reasonably believed"). Here, however, the court of appeals credited predictions with insufficient factual foundation. For example, the court accepted Bowers' speculation, arrived at before Shahar had begun work and before she even had participated in the ceremony, that Shahar "seemingly did not appreciate the importance of appearances and the need to avoid bringing 'controversy' to the Department" and that Shahar would "hold herself out as 'married'" in a way that

would confuse the public as to her relationship's legal status and the Department's legal positions. App.26a, 29a. Upon such speculation, Bowers built his fears of disruption.

The court below should have rejected those fears as unsupported and unreasonable, particularly because the only source that could accurately describe her intentions for the future -- Shahar herself -- had not been consulted. *See Waters*, 511 U.S. at 677 ("[i]t may be unreasonable . . . for the employer to come to a conclusion based on no evidence at all. Likewise, it may be unreasonable for an employer to act based on extremely weak evidence when strong evidence is clearly available"). As the dissenters point out, if Bowers or one of his managers had talked with Shahar, he would have discovered that she very much cared about the Department's needs and had no intention (nor had she done so) of making detrimental public statements or deceiving the public as to the nature of her relationship; Shahar's firing need never have happened. App.63a-65a; R2-34-Shahar Dec. ¶¶8, 11-16.

The appeals court also erroneously ruled that "Shahar's subsequent conduct," wholly unknown to her employer at the critical time, could be considered in evaluating the employer's justifications. App.29a n.21. In addition, the court improperly catalogued its own, very selective list of *post hoc* events in Georgia, and in Congress, to lend weight to Bowers' fears. App.24a n.16, 35a n.24. This extraordinary expansion of the record (with after-acquired evidence of highly questionable relevance) simply underscores the lack of sufficient evidence to support Bowers' worries when he fired Shahar. It also highlights the court of appeals' excessive, almost absolute deference to Bowers because of his role as Attorney General. While it is clearly appropriate to consider Bowers' asserted interests in light of the Department's function within state government and Shahar's planned work there, the approach used below stretches too

far to rubber-stamp the Attorney General's decision, no matter how shaky its foundation.

III. The Court Of Appeals Improperly Rejected The Relevance Of Equal Protection Principles In *Pickering* Cases And Weighed Illegitimate Government Interests In The Employer's Favor

Finally, the decision below departs in yet another significant way from the constitutional law teachings of this Court by allowing government, as employer, to serve illegitimate state interests. The court of appeals categorically rejected the relevance of government-as-sovereign equal protection cases to *Pickering* situations and otherwise erroneously limited equal protection principles. App.33a-38a. The Court should grant the writ to declare that neither group-based public animosity nor discriminatory judgments about a group member's conduct can constitute legitimate concerns on the employer's side of the *Pickering* test, and to correct the *Pickering* outcome here in favor of Shahar.

As *Rankin v. McPherson* made explicit, "[t]he State bears a burden of justifying [the employee's] discharge on *legitimate* grounds." 483 U.S. at 388 (emphasis added). Similarly, in *Umbehr* the Court summarized that "even termination because of protected [First Amendment activity] may be justified when *legitimate* countervailing government interests are sufficiently strong." 116 S.Ct. at 2347 (emphasis added).

Despite that legitimacy requirement, however, the court below held that Bowers can "justify his decision by reference to perceived public hostility" to "his having a Staff Attorney who is part of a same-sex 'marriage.'" App.33a. That concern alone, separate and apart from any "confusion" in the minds of the public about Department legal positions,

properly weighed in Bowers' favor according to the court of appeals. App.33a-35a.

The court also ruled that Bowers' own and the public's perceived assumption about the sexual behavior of gay people ("if it's homosexual, it would have to be sodomy[,]" Bowers 80-81), taken together with the Georgia sodomy statute and *Bowers v. Hardwick*, can properly disqualify Shahar from employment because of her lesbian relationship. App.23a-25a, 31a-37a. The court considered unimportant (a) the explicitly status- and stereotype-based nature of that erroneous assumption about gay people's behavior; (b) the sexual-orientation-neutral coverage of Georgia's consensual sodomy offense; and (c) the more recent involvement of Bowers' office in an equally visible and publicly debated (at least within Georgia) heterosexual sodomy case, R2-35-Mem. at 9, during which Bowers emphasized the irrelevance of his attorneys' private sexual behavior to their jobs, *supra* at 6-7.[10]

Similarly, the court gave weight to Bowers' perception of Shahar as having a "special personal interest" and thus creating potential difficulties for the Department in all kinds of "controversial matters" tied to homosexuality. App.24a, 31a, 37a. The court ignored the lack of factual ties between Shahar and issues such as "homosexual parental rights," App.24a, instead accepting a general, sexual-orientation-based "conflict of interest" that applied to Shahar as a lesbian but not to heterosexual attorneys, who were not perceived

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[10] On rehearing, the court also found unimportant Bowers' own apparent violation of one or more of the state's consensual sex offenses that apply to heterosexuals (adultery, fornication and/or sodomy). *See supra* at 14. His adulterous relationship, moreover, represented a more plausible statement against the marriage laws than Shahar's religious and personal relationship, but Shahar -- because of the "controversial" nature of her sexual orientation -- was the one punished.

as disruptive to the Department's work on cases involving "heterosexual issues" or parties, *see, e.g.*, Bowers 185.

As Judge Birch concluded, all of "Bowers's asserted interests in taking adverse action against Shahar are based on inferences from her status as a homosexual which Bowers claims that he, the public, and department staff are entitled to make." App.80a. But under clear equal protection jurisprudence, "these status-based inferences, unsupported by any facts in the record and explained only by animosity toward and stereotyping of homosexuals, do not constitute a legitimate [state] interest[.]" App.80a; *see also Romer v. Evans*, 517 U.S. __, __, 116 S.Ct. 1620, 1628-29 (1996).

Indeed, Bowers' reasoning is strikingly similar to the city council's reasoning that this Court rejected in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448-50 (1985). There, the city "was concerned with the negative attitude of the majority of property owners" toward the mentally retarded living in a group home near them; the Court stressed, however, that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable . . ., are not permissible bases" for discriminatory government action. *Id.* at 448. The city also offered worries about floods, legal responsibility, overcrowding, and fire hazards, but had no comparable concerns about other housing situations, not involving the mentally retarded, that would logically pose the same issues. As this Court held, "[t]he short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded." *Id.* at 450. Here, Bowers' decision rests on irrational prejudice toward gay people and his asserted concerns should be given no legitimacy or weight under *Pickering*.[11]

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[11] The illegitimacy and irrationality of Bowers' justifications, which ex-

(continued...)

Contrary to the court of appeals' false distinction between sovereign and employer cases, illegitimate bias simply cannot dictate government action, under any circumstances.

> The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private . . . prejudice that they assume to be both widely and deeply held."

Palmore v. Sidoti, 466 U.S. 429, 433 (1984)(ellipsis added to internal quote).

The court of appeals also erred in attempting to distinguish between "people's condition" and "a person's conduct." App.36a. This case involves status-based reaction to and exaggeration of conduct. *Palmore* teaches that adverse judgments about conduct -- such as a relationship -- that are drawn only when the conduct involves a member of an unpopular or despised group are just as illegitimate as other forms of prejudice. 466 U.S. at 433 (involving interracial relationship); *see also Romer*, 116 U.S. at 1623, 1628 (striking down, as "born of animosity," an amendment that prohibited any law or policy "whereby homosexual, lesbian or bisexual orientation, *conduct*, *practices*, or *relationships* shall constitute or otherwise be the basis of . . . [a] claim of discrimination")(emphasis added). Status-based negative views about conduct impose an illegitimate double standard

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[11] (...continued)
plicitly hinge on the lesbian nature of Shahar's relationship, also establish a discrete equal protection violation. The court of appeals' errors with regard to Bowers' discriminatory justifications under *Pickering* distorted the equal protection result as well. *See* App.74a n.2 (Birch, J., concurring).

that cannot properly be invoked by government employers.

The court of appeals' refusal to consider these well-settled principles in assessing the legitimacy of an employer's concerns under *Pickering* is a dangerous error. Now, for example, a disabled attorney could be fired for joining a local church's support group for disabled people, with the rationale that such activity indicates too strong a "special interest" in disability issues and triggers a conflict of interest for a state agency's handling of discrimination complaints. A public employee who, with his companion, openly participates in a workshop for gay writers after work can be uniquely linked to a consensual sodomy statute, despite its application to all couples, and dismissed because of the appearance of "illegal conduct."

Even if such discriminatory reasons are not the only reasons advanced by the employer, these illegitimate considerations have no place in the *Pickering* analysis -- and, in addition to being set aside, should trigger a more skeptical assessment of any other asserted bases for action against the employee's speech or association.[12] This Court should grant review to address the artificial, improper barrier erected below between First Amendment and equal protection dictates.

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[12] Thus, if this Court were to disagree with Shahar and find that only some, not all, of Bowers' concerns are illegitimate, she would still be entitled to a careful re-weighing of the competing *legitimate* interests at stake in this case -- a re-weighing that is likewise required by all of the other errors in the court of appeals' approach to the *Pickering* test.

CONCLUSION

For all the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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Dated: October 30, 1997

APPENDIX

Robin Joy SHAHAR, Plaintiff-Appellant,

v.

Michael J. BOWERS, individually and Thurbert E. Baker, in his official capacity as Attorney General of the State of Georgia, Defendants-Appellants.

No. 93-9345.

United States Court of Appeals,
Eleventh Circuit.

Aug. 1, 1997.

Appeal from the United States District Court for the Northern District of Georgia.

Before HATCHETT, Chief Judge, TJOFLAT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES and BARKETT, Circuit Judges, and GODBOLD and KRAVITCH, Senior Circuit Judges.

BY THE COURT:

This case is before the court on Plaintiff-Appellant's petition for rehearing and on her motion to supplement the record or for a remand to do so.

MOTION TO SUPPLEMENT

Ms. Shahar's petition for rehearing relies, in part, on two recent newspaper articles reporting that former Attorney General Michael J. Bowers has admitted to having an adulterous affair in the past with a woman employed in the Department of Law. She requests that this information become part of the record in this case by judicial notice or by remand to the district court for discovery. Defendants-Appellees, stressing arguments of finality, irrelevance and estoppel, argue that the motion to supplement or to remand

should be denied. The motion to supplement the record or to remand is DENIED.

Although we have inherent equitable power to supplement the record with information not reviewed by the district court, "[s]uch authority is rarely exercised." *Ross v. Kemp*, 785 F.2d 1467, 1474 (11th Cir. 1986). The reason for this rule is that the district courts are the courts in which cases are to be litigated and decided initially.

While we have the authority to supplement a record even after we have rendered both a panel opinion and then an *en banc* opinion on a case, the law's strong interest in finality dictates that supplementation of the record at such a late stage would be an especially extraordinary event and would require the clearest showing of just need to warrant the supplementation.[1] A review of the present record in this case shows that no strong equities favor supplementing the record at this time.

Review of the present record reflects that Ms. Shahar, in the district court, had the opportunity to pursue discovery on the question of whether or not lawyers in the Department of Law -- including the Attorney General -- had committed adultery. She did not press the matter, however. Instead,

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[1] An appeal is the review of the final judgment of the district court. *See* 28 U.S.C. §1291 (Final Decision of District Court). When the district court enters its final judgment on a case, the evidence is closed; and the record (that is, the factual basis of the case) for appeal is established. At no time when a case is on appeal is adding information to the record -- information that was never before the district court -- usual and favored by the law. Therefore, that the information which Ms. Shahar wants us to add to the record now would have been allowed in earlier -- before we had announced our en banc opinion -- is by no means certain; we need not decide that issue because that issue is not before us.

the parties entered into an agreement[2] in district court which limited the efforts of both sides to discover information about the sexual histories of the specific people involved in this litigation.

Pursuant to this agreement, the Attorney General stated that he, on the date that he withdrew the offer to her of employment, had no specific knowledge of any sexual conduct of Ms. Shahar and that his decision to withdraw the offer of employment was based on no act of sexual conduct on Ms. Shahar's part. In turn, Ms. Shahar -- who has had the advice of counsel throughout this case -- agreed to forego having the Attorney General respond to written interrogatories which had requested the names of any law department employees believed by the Attorney General to have engaged in sodomy or adultery.[3] The stipulation worked to protect *both* sides in this litigation from additional trouble,

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[2] The Attorney General seemingly never put his signature on the agreement; the record, however, reflects that Mr. Bowers' deposition testimony is in conformity with the agreement, *see* Bowers Dep. at 67-69, the Motion for Summary Judgment filed by the Attorney General in the district court referenced the agreement, *see* Defendant's Motion for Summary Judgment at 15-16, and we are cited to no act of the Attorney General's office which seems inconsistent with the agreement, although the Attorney General did argue issues of public perception and of appearances on the matter of sodomy and "married" homosexuals in general.

[3] Never has Ms. Shahar said that her interrogatories in the district court were not broad enough to include the Attorney General's own conduct. In fact, she tells us that the information that she advances about Bowers now is precisely the information that "he refused to discuss in discovery." Petition for Rehearing and Motion to Supplement the Record or For Remand to Do So at 2. Particularly in the light of the correspondence between the parties when they were in the district court, we agree. Although we think it is plain that Ms. Shahar did undertake discovery on the matters now at issue, whether she did so or not, she could have done so; and this point is the main one.

including intrusions into their personal histories, as this case churned through the district court.

But this point is the decisive one: Given that Ms. Shahar, in the district court, made no motions to compel the discovery of the names of law department employees who had engaged in adultery, we cannot say that the information about Mr. Bowers which she seeks to inject into the case now -- almost six years after she filed her lawsuit and more than three years after the district court ruled against her -- was information which she could not have discovered with due diligence years ago. Because Ms. Shahar did not diligently seek out this information when the information could have been regularly considered by the district court and then by the court of appeals, no strong equities favor her request that we take the extraordinary step of supplementing the record at this late moment.

Parties to lawsuits often agree to limit discovery to avoid extra costs or embarrassment, or one side just chooses to abandon some line of discovery as more trouble than it is worth. These kinds of decisions are strategic and routine. A party's strategic decisions for litigation are, to a great extent, based on conjectures about what future course will be most favorable to the party; with hindsight, some of the conjectures turn out to be incorrect. But to hold litigants to their strategic decisions on how broadly or narrowly they wish to litigate is not unfair.[4] So, we will not remand this

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[4] Our colleagues, who dissent from the denial of the motion to supplement, quote one sentence from the Response to the motion. The sentence is accurately quoted. But the Response as a whole is about seven pages in length. Taken as a whole, the Response is no definite and unconditional stipulation by Appellees that the record should be supplemented now. *See, e.g.*, Response at 1 ("Both Mr. Baker and Mr. Bowers oppose Appellant's Motion for Rehearing and her Motion to Supplement the Record in this case with the Declaration of Michael Adams

(continued...)

case for the parties to start over now.

In addition to the procedural bar, we point out that the taking of judicial notice of facts is, as a matter of evidence law, a highly limited process. The reason for this caution is that the taking of judicial notice bypasses the safeguards which are involved with the usual process of proving facts by competent evidence in district court. Courts can take notice of certain facts without formal proof but only where

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[4] (...continued)
[containing the two newspaper articles]."); *Id.* at 2 ("The interests of finality alone would dictate that the motion to supplement should be denied.").

More important, however, is this point of law: The parties to an appeal cannot bind the court to supplement the record no matter how plainly they both stipulate that supplementation is all right with them. The appellate court has the duty to make the decision to supplement or not to supplement.

In some cases, the parties may, for their own reasons, be happy for litigation to continue or feel -- perhaps for reasons that have little to do with the case or with the law -- that some evidence should not be objected to by them. But the cases in this court are our business, too. An appellate court has the duty to consider wider circumstances than the parties' preferences or lack of objections. For example, it is vital that we see to it that litigation (including discovery disputes and compromises) in the district courts be taken seriously by the parties and that the litigation be conducted in an orderly way in accord with regular procedures and practices. We also have a duty to see to it that finality means something real in the federal courts.

Our duties require (even in cases with great, immediate attention from the public) not only that we must consider the case before us, but that we must keep our eyes fixed on the precedent we might make and on the conduct of the business -- present and future -- of the courts generally. While we decide one case at a time, we do so against a background of the law, that is, the set of principles which will regulate all cases. These simple, but high, concerns drive today's decision to prohibit the supplementation -- after our court has ruled twice and long after the district court has ruled -- of the record in this case.

the fact in question is "one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed.R.Evid. 201(b).

For example, the kinds of things about which courts ordinarily take judicial notice are (1) scientific facts: for instance, when does the sun rise or set; (2) matters of geography: for instance, what are the boundaries of a state; or (3) matters of political history: for instance, who was president in 1958. Ms. Shahar asks us to take judicial notice of the conduct of one person, Michael J. Bowers; and she asks us to take judicial notice of conduct which is not his official conduct (an example of his official conduct which might be judicially noticed would be that he issued a particular official opinion on a certain date). She has shown us no case -- and we have found none -- where a federal court of appeals took judicial notice of the unofficial conduct of one person based upon newspaper accounts (or the person's campaign committee's press release) about that conduct.[5] We are not inclined to extend the doctrine of

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[5] We stress that we are not asked merely to take judicial notice of the fact that the media has reported "X" or the fact that a press release says "X." We are asked to know "X."

The dissent mentions a statement "made by Mr. Bowers." The only pertinent statement before us which might be said to have been made by Mr. Bowers is a written press release on "Bowers for Governor" letterhead. The statement is unsworn, unsigned, and speaks neither of "adultery" nor of other sexual conduct; it does use words like "involved with" and "relationship." Whatever people in general may wish to infer for themselves from this release, the statement lays no foundation for a federal court's taking judicial notice that Mr. Bowers has committed adultery or fornication.

judicial notice as far as Plaintiff-Appellant asks us to take it.[6]

Apart from these other sufficient and independent reasons for declining to supplement the record, we also decline because--if the proposed supplemental information were to be added to the many other circumstances already in the case--we cannot readily say that the result of the case probably would be different from the 30 May result.

ON PETITION FOR REHEARING

The petition for rehearing is DENIED.

BIRCH and BARKETT, Circuit Judges, and GODBOLD, Senior Circuit Judge, dissenting:

Motion to Supplement the Record or for a Remand to Do So:

We dissent from the court's denial of Shahar's motion to supplement the record. Bowers' public statement is relevant to whether his asserted fear of adverse public reaction to perceived sexual misconduct of persons in the Georgia Department of Law was a bona fide reason for terminating Shahar and to whether he acted as a non-discriminatory decisionmaker in the Shahar matter.

Failure to seek discovery at the trial level is no bar to supplementing the record. The inquiry at the trial court stage concerned policy relating to employees of the Department, not the conduct of Bowers himself as head of the Department or his capacity as a decisionmaker

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[6] We do not accept this proposition to be part of the law of evidence: that information -- a "fact" which is an improper subject of judicial notice -- automatically becomes a proper subject of judicial notice if no party objects to the "fact" and that, therefore, an appellate court is bound to take judicial notice of the "fact."

concerning Shahar. Moreover, the discovery "agreement"[1] below is irrelevant to this motion to supplement. Shahar does not ask that she somehow be allowed to pursue discovery in contravention of the agreement. Bowers admitted publicly certain facts less than one week after the decision of the *en banc* court was published. The case is still open in view of the fact that it is subject to a petition for rehearing. *See* Fed. R.App. P. 40. Shahar asks that the court supplement the record with Bowers' admission. We see no difference between this situation and one in which Bowers would have made his admission before the *en banc* decision issued. Surely, at that stage, Shahar's failure to pursue the new information below would have worked no bar to supplementing the record.

The majority contends that the equities weigh against granting Shahar's request to supplement the record at this late stage because she failed to discover in the district court the information about Bowers' affair. We submit that the majority, in balancing the equities, also should have considered the fact that Bowers waited until a few days after its decision issued before he made the information public. This timing, to say the least, is suspicious; especially considering that, despite his discovery agreement with Shahar, Bowers was able to argue in this court "issues of public perception and of appearances on the matter of sodomy and [ ]married[ ] homosexuals in general." Majority Order at 3 n.1. Not only was Bowers able to argue that point, but he also was able to argue that Shahar could not function as a trustworthy member of his staff because she likely had a conflict of interest with respect to Georgia's sodomy laws. Considering that Bowers admits that, perhaps

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[1] The record shows that the alleged agreement was never executed by the parties. We assume that there was an agreement to limit discovery for the purpose of this motion.

at the very time he fired Shahar, he also was breaking Georgia's adultery and fornication laws, his justification is entitled to no weight. At the very least, Bowers' justification evinces discrimination against Shahar solely on the basis of her status as a homosexual, since Bowers did not make the same assumption about conflict of interest with respect to himself or other lawyers in his department. *See Shahar v. Bowers*, 114 F.3d 1097, 1128-29 & nn.6-7.

Judicial notice is obviously appropriate. The "newspaper account" was not a reporter's conclusion or a statement by a third party; it was a statement by Bowers admitting his conduct and asking forgiveness for it. The statement was made through Bowers' political campaign headquarters and was published nationwide by newspapers, radio, television, and magazines of national circulation. Surely, this court can know the content of a statement that is relevant, accurate because made by Bowers himself, and known to millions. Moreover, in light of the fact that "Attorney General Baker and Bowers have no objection to the Court's including the proffered information in the record of this case," Response of Attorney General Thurbert E. Baker and Former Attorney General Michael J. Bowers to Appellant's Motion to Supplement the Record or for a Remand to Do So at 7, we fail to see why the court refuses to do so.

Petition for Rehearing:

We dissent from the court's denial of Shahar's petition for rehearing.

Robin Joy SHAHAR, Plaintiff-Appellant,

v.

Michael J. BOWERS, Individually and in his official capacity as Attorney General of the State of Georgia, Defendant-Appellee.

No. 93-9345.

United States Court of Appeals,
Eleventh Circuit.
May 30, 1997.

Appeal from the United States District Court for the Northern District of Georgia.

Before HATCHETT, Chief Judge, TJOFLAT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES and BARKETT, Circuit Judges, and GODBOLD and KRAVITCH,* Senior Circuit Judges.

EDMONDSON, Circuit Judge:

In this government-employment case, Plaintiff-Appellant contends that the Attorney General of the State of Georgia violated her federal constitutional rights by revoking an employment offer because of her purported "marriage"[1] to another woman. The district court concluded that Plaintiff's rights had not been violated. We affirm.

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* Honorable Phyllis A. Kravitch heard oral argument in this case on 23 October 1996 as a judge on active status. She took senior status on 31 December 1996 and has elected to participate in this decision pursuant to 28 U.S.C. §46(c).

[1] For clarity's sake, we use the words "marriage" and "wedding" (in quotation marks) to refer to Shahar's relationship with her partner; we use the word marriage (absent quotation marks) to indicate legally recognized heterosexual marriage.

Given the culture and traditions of the Nation, considerable doubt exists that Plaintiff has a constitutionally protected federal right to be "married" to another woman: the question about the right of intimate association. *See generally F/W PBS, Inc. v. City of Dallas*, 493 U.S. 215, 237-39, 110 S.Ct. 596, 611, 107 L.Ed.2d 603 (1990); *Roberts v. United States Jaycees*, 468 U.S. 609, 618-19, 104 S.Ct. 3244, 3250, 82 L.Ed.2d 462 (1984). Given especially that Plaintiff's religion requires a woman neither to "marry" another female -- even in the case of lesbian couples -- nor to marry at all, considerable doubt also exists that she has a constitutionally protected federal right to be "married" to another woman to engage in her religion: the question about the right of expressive association. *See generally Salvation Army v. Dept. of Community Affairs of State of N.J.*, 919 F.2d 183, 198-200 (3d Cir. 1990).[2] *See also Lyng v.*

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[2] These doubts are suggested by a variety of considerations, to state briefly a few: (1) where "rights" are not set out in the Constitution's text, we must be especially cautious about creating rights merely because they might seem like a good idea to us or because some part of the population believes them to be a good idea. *See Bowers v. Hardwick*, 478 U.S. 186, 194, 106 S.Ct. 2841, 2846, 92 L.Ed.2d 140 (1986) ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."); (2) we are now in the two hundred and twenty-first year of the independence of the Nation and well over a century beyond the adoption of the Civil War Amendments, including the Fourteenth Amendment, to the Constitution, yet no federal appellate court or state supreme court has recognized the federal rights of same-sex marriage claimed by Plaintiff; (3) the institution of marriage has been the source before of constitutional controversy in which the challenge was made that the institution of marriage involved some combination other than one man and one woman. The advocates of polygamy, we assume, were no less sincere than the advocates of same-sex marriage, and they too had some religious arguments for their views. Yet, the Supreme Court repeatedly held that the Constitution provides no pro-

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Northwest Indian Cemetery Protective Assn., 485 U.S. 439, 449-51, 108 S.Ct. 1319, 1326, 99 L.Ed.2d 534 (1988); *Employment Div., Dept. of Human Res. v. Smith*, 494 U.S. 872, 883-85, 110 S.Ct. 1595, 1603, 108 L.Ed.2d 876 (1990); *Bowen v. Roy*, 476 U.S. 693, 699- 701, 106 S.Ct. 2147, 2152, 90 L.Ed.2d 735 (1986)(plurality opinion) ("Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family.")(emphasis in original).[3]

Because even a favorable decision on these constitutional questions would entitle Plaintiff to no relief in this case, powerful considerations of judicial restraint call upon us not to decide these constitutional issues. *See e.g., Lyng*, 485 U.S. at 443-46, 108 S.Ct. at 1323 ("A fundamental and long-standing principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."); *Employment Div., Dept. of Human Res. v. Smith*, 485 U.S. 660, 673- 74, 108 S.Ct. 1444, 1452, 99 L.Ed.2d 753 (1988); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293-95, 102 S.Ct. 1070, 1077, 71 L.Ed.2d 152 (1982)("[T]his self-imposed limitation on the exercise of this Court's jurisdiction has an importance to the institution that transcends the significance of particular controversies.") So, today we do stop short of making a final decision about such claimed rights. Instead,

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[2] (...continued)
tection to polygamous marriages. *See e.g., Reynolds v. United States*, 98 U.S. 145, 166-167, 25 L.Ed. 244 (1878)(Free Exercise Clause does not require that "those who make polygamy a part of their religion are excepted from the operation of the statute" criminalizing polygamy).

[3] Though the *Bowen* opinion was a plurality opinion, a majority of the Court joined in the portion of the opinion quoted above.

we assume (for the sake of argument only) that Plaintiff has these rights; but we conclude that the Attorney General's act -- as an employer -- was still lawful.

I.

The facts are not much in dispute; but we accept Plaintiff's view when there is uncertainty. Plaintiff Robin Joy Shahar is a woman who has "married" another woman in a ceremony performed by a rabbi within the Reconstructionist Movement of Judaism. According to Shahar, though the State of Georgia does not recognize her "marriage" and she does not claim that the "marriage" has legal effect, she and her partner consider themselves to be "married."

Since August 1981, Defendant-Appellee Michael J. Bowers has been the Attorney General of the State of Georgia, a statewide elective office. He has been elected to the office four times. As the Attorney General, Bowers is the chief legal officer of the State of Georgia and head of the Georgia Department of Law (the "Department"). His responsibilities include enforcing the laws of the State by acting as a prosecutor in certain criminal actions; conducting investigations; representing Georgia, its agencies and officials in all civil litigation (including habeas corpus matters); and providing legal advice (including advice on the proper interpretation of Georgia law) to Georgia's executive branch.

While a law student, Shahar spent the summer of 1990 as a law clerk with the Department.[4] In September 1990, the Attorney General offered Shahar the position of Staff

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[4] When she was employed by the Department as a summer clerk and when she was offered a position with the Department, Shahar was known as "Robin Brown." Following her "wedding," she and her partner changed their last names to "Shahar."

Attorney when she graduated from law school.[5] Shahar accepted the offer and was scheduled to begin work in September 1991.

In the summer of 1990, Shahar began making plans for her "wedding." Her rabbi announced the expected "wedding" to the congregation at Shahar's synagogue in Atlanta. Shahar and her partner invited approximately 250 people, including two Department employees, to the "wedding." The written invitations characterized the ceremony as a "Jewish, lesbian-feminist, out-door wedding." The ceremony took place in a public park in South Carolina in June 1991.

In November 1990, Shahar filled out the required application for a Staff Attorney position. In response to the question on "marital status," Shahar indicated that she was "engaged." She altered "spouse's name" to read "future spouse's name" and filled in her partner's name: "Francine M. Greenfield." In response to the question "Do any of your relatives work for the State of Georgia?" she filled in the name of her partner as follows: "Francine Greenfield, future spouse."[6]

Sometime in the spring of 1991, Shahar and her partner were working on their "wedding" invitations at an Atlanta restaurant. While there, they ran into Elizabeth Rowe and Susan Rutherford. Rowe was employed by the Department as a paralegal, Rutherford as an attorney. Rowe was invited to, and did attend, Shahar's ceremony. The four women

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[5] "To carry out the functions of the Attorney General and the Department of Law," section 45-15-30 of the Code of Georgia empowers the Attorney General to hire various subordinate lawyers within the Department. Section 45-15 -31(a) provides that all such subordinate attorneys "shall be appointed by the Attorney General for such periods of time as he deems advisable" and "may be removed by the Attorney General."

[6] Greenfield was employed by a state university at the time.

had a brief conversation, which included some discussion of the "wedding" preparations.

In June 1991, Shahar told Deputy Attorney General Robert Coleman that she was getting married at the end of July, changing her last name, taking a trip to Greece and, accordingly, would not be starting work with the Department until mid-to-late September. At this point, Shahar did not say that she was "marrying" another woman. Senior Assistant Attorney General Jeffrey Milsteen, who had been co-chair of the summer clerk committee, was in Coleman's office at the time and heard Coleman congratulate Shahar. Milsteen later mentioned to Rutherford that Shahar was getting married. Rutherford then told Milsteen that Shahar was planning on "marrying" another woman. This revelation caused a stir.

Senior aides to the Attorney General became concerned about what they viewed as potential problems in the office resulting from the Department's employment of a Staff Attorney who purported to be part of a same-sex "marriage." As the Attorney General was out of the office that week, the five aides held several meetings among themselves to discuss the situation.

Upon the Attorney General's return to the office, he was informed of the situation. He held discussions with the senior aides, as well as a few other lawyers within the Department. After much discussion, the Attorney General decided, with the advice of his senior lawyers, to withdraw Shahar's job offer. In July 1991, he did so in writing. The pertinent letter stated that the withdrawal of Shahar's offer:

> has become necessary in light of information which has only recently come to my attention relating to a purported marriage between you and another woman. As chief legal officer of this state, inaction on my part would constitute

> tacit approval of this purported marriage and jeopardize the proper functioning of this office.

The Attorney General and his staff have also indicated (in depositions taken in the present action) that, after weighing the facts and relevant considerations, they concluded that Shahar's same-sex "marriage" would create the appearance of conflicting interpretations of Georgia law and affect public credibility about the Department's interpretations; interfere with the Department's ability to handle controversial matters; interfere with the Department's ability to enforce Georgia's sodomy law; and, in general, create difficulties maintaining the supportive working relationship among the office lawyers that is necessary for the proper functioning of the Department. Also, following her decision to participate in a controversial same-sex "wedding," the Attorney General and his staff had serious doubts about the quality of Shahar's judgment in general.

Shahar brought the present action against the Attorney General, individually and in his official capacity, seeking both damages and injunctive relief (including "reinstatement"). She said revoking her offer violated her free exercise and free association rights and her rights to equal protection and substantive due process.[7]

Bowers moved for summary judgment on all causes of action. On that same day, Shahar moved for partial summary judgment.[8] The district court granted the Attorney General's motion for summary judgment and denied Shahar's.

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[7] On appeal, Shahar does not contest the dismissal of her substantive due process claim.

[8] Shahar moved for summary judgment on her freedom of association and free exercise claims.

II.

Even when we assume, for argument's sake, that either the right to intimate association or the right to expressive association or both are present, we know they are not absolute. *Cf. Board of Comm'rs, Wabaunsee Cty. v. Umbehr*, ___ U.S. ___, ___, 116 S.Ct. 2342, 2347, 135 L.Ed.2d 843 (1996)("While protecting First Amendment freedoms, we have, however, acknowledged that the First Amendment does not create property or tenure rights, and does not guarantee absolute freedom of speech.")[9] Georgia and its elected Attorney General also have rights and duties which must be taken into account, especially where (as here) the State is acting as employer. *See e.g., Rankin v. McPherson*, 483 U.S. 378, 384-86, 107 S.Ct. 2891, 2897, 97 L.Ed.2d 315 (1987)("[P]ublic employers are *employers*, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions."). We also know that because the government's role as employer is different from its role as sovereign, we review its acts differently in the different contexts. *See Waters v. Churchill*, 511 U.S. 661, 675-76, 114 S.Ct. 1878, 1888, 128 L.Ed.2d 686 (1994)(plurality opinion)("The key to First Amendment analysis of government employment decisions . . . is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.") In reviewing Shahar's claim, we stress that this case is about the government acting as employer.

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[9] The Supreme Court has identified the origin of the right to intimate association as First Amendment freedom of association. *See Board of Dirs. of Rotary Intern. v. Rotary Club*, 481 U.S. 537, 545-47, 107 S.Ct. 1940, 1946, 95 L.Ed.2d 474 (1987).

A.

Shahar argues that we must review the withdrawal of her job offer under strict scrutiny. The only precedent to which Shahar refers us for the proposition that strict scrutiny is to be applied to the government as employer is *Dike v. School Board*, 650 F.2d 783 (5th Cir. Unit B 1981). In *Dike*, the Fifth Circuit -- our predecessor -- implied that a school district's refusal to allow a teacher to breast-feed her child on her lunch hour must withstand strict scrutiny. *Id.* at 787 ("[T]he school board may establish by appropriate pleading and proof that its regulations . . . as applied to teachers who breastfeed their children during their non-duty time, further sufficiently important state interests and are closely tailored to effectuate only those interests.").[10] To the extent that *Dike* might be interpreted as requiring strict scrutiny review of a government employee's freedom of intimate association claim, it misstates the appropriate standard; and we overrule it now.[11]

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[10] In *Dike*, the district court had dismissed the teacher's complaint on the ground that no constitutionally protected interest was involved. The *Dike* court's actual holding was that she had stated a cause of action and that further proceedings were necessary. *Id.* at 785.

[11] In her concurring opinion when the case was before our three-judge panel, Judge Kravitch characterized the *Dike* opinion this way: "nominally applying strict scrutiny to school board's burden on employee's liberty interest in breast-feeding her child, but remanding for reconsideration of whether school board's interest in avoiding disruption of educational process, ensuring that teachers perform their duties without distraction, and avoiding potential liability for accidents were strong enough to justify the burden." *Shahar v. Bowers*, 70 F.3d 1218, 1231 n.11 (11th Cir. 1995), *vacated*, 78 F.3d 499 (1996). *See also id.* at 1231 ("A survey of intimate association cases (and analogous privacy cases) in the context of employment reveals that courts, irrespective of the doctrinal test being applied, have consistently balanced the interest of the government employer in the efficient functioning of its office against the

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We also note that the Supreme Court recently rejected a similar argument in an analogous case. In *Board of Comm'rs, Wabaunsee Cty. v. Umbehr*, ___ U.S. ___, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996), the Court held that government contractors are protected from termination or failure to renew their contracts for exercising their free speech rights and that the *Pickering* balancing test[12] is the appropriate standard for determining whether a First Amendment violation has occurred.[13] The Court specifically rejected the contractor's argument that "on proof of viewpoint-based retaliation for contractors' political speech, the government should be required to justify its actions as narrowly tailored to serve a compelling state interest," *id.* at ___, 116 S.Ct. at 2349, and wrote as follows:

> [Contractor] is correct that if the Board had exercised sovereign power against him

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[11] (...continued)
employee's interest in pursuing his or her constitutionally protected freedom.") We agree that *Dike*, given the case's procedural posture on appeal, is not clear about what, if anything, it actually decides about the applicability of strict scrutiny -- as opposed to balancing of interests -- to government employment cases.

[12] For background, see *Pickering v. Board of Ed.*, 391 U.S. 563, 566-68, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). The outcome of the *Pickering* balancing test is a question of law. *See e.g., Connick v. Myers*, 461 U.S. 138, 150 n.10, 103 S.Ct. 1684, 1692 n.10, 75 L.Ed.2d 708 (1983).

[13] In *Umbehr*, the Court determined "whether, and to what extent, the First Amendment protects independent contractors from the termination of at-will government contracts in retaliation for their exercise of the freedom of speech." *Id.*, ___ U.S. at ___, 116 S.Ct. at 2345. Upon holding that the First Amendment protects contractors from such retaliatory termination, it then determined the relevant standard for deciding whether a government contractor's First Amendment rights had been violated.

> as a citizen in response to his political speech, it would be required to demonstrate that its action was narrowly tailored to serve a compelling governmental interest. But in this case, as in government employment cases, the Board exercised contractual power, and its interests as a public service provider, including its interest in being free from intensive judicial supervision of its daily management functions, are potentially indicated. Deference is therefore due to the government's reasonable assessment of its interest *as contractor*.

Id. at ___, 116 S.Ct. at 2349.

We conclude that the appropriate test for evaluating the constitutional implications of the State of Georgia's decision -- as an employer -- to withdraw Shahar's job offer based on her "marriage" is the same test as the test for evaluating the constitutional implications of a government employer's decision based on an employee's exercise of her right to free speech, that is, the *Pickering* balancing test.[14]

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[14] In *Parks v. City of Warner Robins*, 43 F.3d 609 (11th Cir. 1995), we recently held that a government employee's termination (pursuant to an anti-nepotism policy) did not impose a "significant burden" on either her right to marry or her right to intimate association and, therefore, we reviewed the city's anti-nepotism policy (as applied to that employee) under the rational basis test. In so doing, we distinguished generally applicable legislative acts from ad hoc executive decisions:

> Unlike the legislative act embodied in Warner-Robins' anti-nepotism policy, however, the secretary's reassignment in *McCabe* [*v. Sharrett*, 12 F.3d 1558 (1994)] was a quintessentially executive act. *See McKinney v. Pate*, 20 F.3d 1550, 1557 n.9 (11th Cir. 1994)(en banc)(distinguishing executive

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B.

We have previously pointed out that government employees who have access to their employer's confidences or who act as spokespersons for their employers, as well as those employees with some policy-making role, are in a special class of employees and might seldom prevail under the First Amendment in keeping their jobs when they conflict with their employers. *See Bates v. Hunt*, 3 F.3d 374, 378 (11th Cir. 1993); *Sims v. Metropolitan Dade County*, 972 F.2d 1230, 1237-38 (11th Cir. 1992). *See also Kinsey v. Salado Independent School Dist.*, 950 F.2d 988 (5th Cir. 1992)(*en banc*). *See generally Pickering v. Board of Ed.*, 391 U.S. 563, 570 n.3, 88 S.Ct. 1731, 1735 n.3, 20 L.Ed. 2d 811 (1968).

Put differently, the government employer's interest in staffing its offices with persons the employer fully trusts is given great weight when the pertinent employee helps make policy, handles confidential information or must speak or act -- for others to see -- on the employer's behalf. *See Bates*, 3 F.3d at 378; *Sims*, 972 F.2d at 1237-38. Staff Attorneys inherently do (or must be ready to do) important things, which require the capacity to exercise good sense and discretion (as the Attorney General, using his considered judgment, defines those qualities): advise about policy; have access to

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[14] (...continued)

acts, which "characteristically apply to a limited number of persons" and which "typically arise from the ministerial or administrative activities of members of the executive branch" from legislative acts, which "generally apply to a larger segment of . . . society" and which include "laws and broad-ranging executive regulations.").

Id. at 613 n.2. Nothing in this opinion is intended to disapprove *Parks* or to hint that it is no longer the law in this circuit for reviewing legislative acts.

confidential information (for example, litigation strategies); speak, write and act on behalf of the Attorney General and for the State.

In a case such as this one, the employee faces a difficult situation. In fact, we know of no federal appellate decision in which a subordinate prosecutor, state's attorney or like lawyer has prevailed in keeping his job over the chief lawyer's objection. *See e.g., Connick v. Myers*, 461 U.S. 138, 154-56, 103 S.Ct. 1684, 1694, 75 L.Ed.2d 708 (1983); *Livas v. Petka*, 711 F.2d 798, 801 (7th Cir. 1983)("One of the problems faced by a prosecutor such as Petka, however, is that his policies are implemented by subordinates . . . . That Petka lost confidence in Livas, for whatever reason, is therefore sufficient justification for Livas' dismissal.").[15] We

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[15] *Livas* involved the termination of an assistant state's attorney for political patronage reasons and, accordingly, the Seventh Circuit analyzed that claim under the test developed by the Supreme Court for such cases. Though Shahar's case is not a political patronage case and does not trigger the precise same concerns as those cases, her case is analogous to *Livas* (and other political patronage cases involving prosecutors). That is, the chief attorney (at whatever level, for example, attorney general, district attorney) must have a faith and confidence in his professional legal staff that might not ordinarily be required in other areas of government employment. So, in balancing the parties' interests, the chief attorney must be given greater deference in his employment decisions than might be appropriate in other areas of government employment. *See also Americanos v. Carter*, 74 F.3d 138, 143 (7th Cir. 1996)(deputy attorney general not entitled to protection where "DAGs have the direct ability to implement the policies and goals of the AG" and "the legislature . . . also felt that it was important for an AG to employ the legal staff of his or her own choosing") (citing relevant statute); *Monks v. Marlinga*, 923 F.2d 423, 426 (6th Cir.1991)(*per curiam*)(assistant prosecuting attorney not entitled to protection as "the job of assistant prosecutor is a policy- making position"). *Cf. Branti v. Finkel*, 445 U.S. 507, 519 n.13, 100 S.Ct. 1287, 1295 n.13, 63 L.Ed.2d 574 (1980)(observing that responsibilities of assistant public defender are "in contrast to the

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conclude that the Attorney General -- who is an elected official with great duties and with no job security except that which might come from his office's performing well -- may properly limit the lawyers on his professional staff to persons in whom he has trust.

As both parties acknowledge, this case arises against the backdrop of an ongoing controversy in Georgia about homosexual sodomy, homosexual marriages, and other related issues, including a sodomy prosecution -- in which the Attorney General's staff was engaged -- resulting in the well-known Supreme Court decision in *Bowers v. Hardwick*, 478 U.S. 186, 190-92, 106 S.Ct. 2841, 2844, 92 L.Ed.2d 140

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[15] (...continued)
broader public responsibilities of an official such as a prosecutor.")

At least before the Government Employee Rights Act of 1991, we, in our Title VII and Age Discrimination in Employment Act jurisprudence, held that assistant state attorneys and the like -- lawyers who serve at the pleasure of their policy-making chief -- were not employees protected by the statutes, but were members of the personal staff of the chief lawyer: the position is one of policy-making level, involving one who necessarily advises, and acts upon, the exercise of constitutional and legal powers of the chief's office. *See e.g., EEOC v. Reno*, 758 F.2d 581, 584 (11th Cir. 1985)(assistant state attorney). *See also Wall v. Coleman*, 393 F.Supp. 826, 831 (S.D.Ga.1975)("As a matter of common knowledge and experience we know that [a district attorney] gets public credit for the good job done and impression made by his assistants and gets public criticism for the poor performance or impression made by his assistants. At election time he is judged by what he and his assistants have done."). This "personal staff" (to use Congress's words) idea embodies the general and traditional proposition that positions of confidentiality, policy-making or acting and speaking before others on behalf of the chief are truly different from other kinds of employment. This point is central to the case now before us.

In deciding the present case, we put aside all other kinds of public employment; but, in doing so, we do not say today that other kinds of employment would necessarily lead to a different result.

(1986)(criminal prosecution of homosexual sodomy does not violate substantive due process).[16] When the Attorney General viewed Shahar's decision to "wed" openly -- complete with changing her name -- another woman (in a large "wedding") against this background of ongoing controversy, he saw her acts as having a realistic likelihood to affect her (and, therefore, the Department's) credibility, to interfere with the Department's ability to handle certain kinds of controversial matters (such as claims to same-sex marriage licenses, homosexual parental rights, employee benefits, insur-

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[16] The controversy in the State of Georgia and the Attorney General's involvement at the heart of that controversy, both as the State's litigator and its legal advisor, have not let up since the Attorney General's 1991 decision to revoke the offer to Shahar. *See In re R.E.W.*, 267 Ga. 62, 472 S.E.2d 295 (1996)(three-judge dissent from denial of certiorari to review court of appeal decision holding restriction on father's visitation rights inappropriate where based on his homosexual relationship); *Christensen v. State*, 266 Ga. 474, 468 S.E.2d 188, 190 (1996)(in case involving same-sex solicitation in public rest area, upholding -- against challenge based on state constitution -- statute criminalizing solicitation of sodomy); *City of Atlanta v. McKinney*, 265 Ga. 161, 454 S.E.2d 517, 521 (1995)(striking down portion of Atlanta ordinance mandating provision of benefits to registered "Domestic Partners"); *Van Dyck v. Van Dyck*, 262 Ga. 720, 425 S.E.2d 853 (1993)(live-in lover statute inapplicable to attempt to modify alimony where former spouse lived in meretricious same-sex relationship); Op. Att'y. Gen 96-7, 1996 WL 180274 (Ga.A.G.)(Attorney General called on to advise whether state college newspaper may refuse to publish advertisements suggesting that homosexuals are not "born gay" and "[t]here is another way out" and containing text which "might be perceived to 'derogatorily describe homosexuals'"); Op. Att'y Gen. 94-14 (1994 Ops. Att'y Gen. Ga. 32 (Darby 1994))(Attorney General called on to advise Insurance Commissioner as to approval of proposed policy amendment affording group accident and health coverage to "domestic partners"); Op. Att'y Gen. 93-26 (1993 Ops. Att'y Gen. Ga. 72 (Darby 1993))(Attorney General called on to advise Insurance Commissioner regarding "group health insurance provided pursuant to municipal ordinances which create the status of domestic partnership").

ance coverage of "domestic partners"), to interfere with the Department's efforts to enforce Georgia's laws against homosexual sodomy,[17] and to create other difficulties

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[17] About public perception, we accept that the fact the Shahars are professed lesbians and see themselves as "married" does not prove beyond reasonable doubt that either of them has engaged in sodomy within the meaning of Georgia law. But we also accept that, when two people say of themselves that they are "married" to each other, it is reasonable for others to think those two people engage in marital relations. A United States Circuit Judge in another circuit has written: "Sodomy is an act basic to homosexuality." *See Watkins v. U.S. Army*, 847 F.2d 1329, 1357 (9th Cir.1988)(Reinhardt, J., dissenting), *vacated*, 875 F.2d 699 (1989). We cannot say that Georgia's Attorney General is clearly wrong to worry that reasonable people -- inside and outside the Law Department -- in Georgia could think along these same lines. Whatever else may be doubted about Georgia's sodomy law, we know that its application to homosexual sodomy violates no fundamental liberty interest protected by the Federal Constitution because the Supreme Court has already so held. *See Bowers v. Hardwick*, 478 U.S. 186, 193-98, 106 S.Ct. 2841, 2846-47, 92 L.Ed.2d 140 (1986). *See also id.* at 188 n.2, 106 S.Ct. at 2842 n.2 ("We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy."). We acknowledge that some reasonable persons may suspect that having a Staff Attorney who is part of a same-sex "marriage" is the same thing as having a Staff Attorney who violates the State's law against homosexual sodomy. So, we accept that Shahar's participation in a same-sex "wedding" and "marriage" could undermine confidence about the Attorney General's commitment to enforce the State's law against homosexual sodomy (or laws limiting marriage and marriage benefits to traditional marriages).

Shahar has tried to analogize this case (specifically, the Attorney General's concerns about Shahar's "marriage") to miscegenation cases. Particularly given the obvious difference between concerns about public perception about miscegenation -- which cannot constitute a legitimate governmental interest, *see Loving v. Virginia*, 388 U.S. 1, 10-12, 87 S.Ct. 1817, 1823, 18 L.Ed. 2d 1010 (1967) -- and concerns about public perceptions about whether a Staff Attorney in the Attorney General's office is engaged in an ongoing violation of criminal laws against homo-

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within the Department which would be likely to harm the public perception of the Department. *See Board of Comm'rs, Wabaunsee Cty. v. Umbehr*, ___ U.S. ___, ___, 116 S.Ct. 2342, 2347, 135 L.Ed.2d 843 (1996)("The government needs to be free to terminate both employees and contractors . . . to improve the efficiency, efficacy and responsiveness of service to the public, . . .").

In addition, because of Shahar's decision to participate in such a controversial same-sex "wedding" and "marriage" and the fact that she seemingly did not appreciate the importance of appearances and the need to avoid bringing "controversy" to the Department, the Attorney General lost confidence in her ability to make good judgments for the Department.

Whatever our individual, personal estimates might be, we -- as we observe throughout this opinion -- cannot say that the Attorney General's worries and view of the circumstances that led him to take the adverse personnel action against Shahar are beyond the broad range of reasonable assessments of the facts.[18] *See Waters v. Churchill*, 511 U.S.

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[17] (...continued)
sexual sodomy -- which laws the Supreme Court has said are valid, *see Bowers*, 478 U.S. at 193-198, 106 S.Ct. at 2846-47, we believe that the analogy is not helpful to decide this case.

[18] Shahar was notified of the withdrawal of her employment offer at a face-to-face meeting not with the Attorney General, but with two of his senior aides. The withdrawal of the offer was set out in writing in a letter signed by the Attorney General which was handed to Shahar at this meeting. The Attorney General did not meet with Shahar before he withdrew his offer. He acted based on the information supplied to him from his trusted aides who had spoken directly with Shahar -- by telephone or in person -- about her intent to "marry" a woman and from aides who had seen her job application in which she had, in writing, described a woman as her "future spouse." The decisive information that Shahar in-
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661, 673-81, 114 S.Ct. 1878, 1887-90, 128 L.Ed.2d 686 (1994)(plurality opinion)(for *Pickering* balance, facts to be weighed on government's side merely need to be reasonable view of facts or reasonable predictions; manager's view of circumstances is entitled to substantial weight).

C.

We must decide whether Shahar's interests outweigh the disruption and other harm the Attorney General believes her employment could cause. *Pickering* balancing is never a precise mathematical process: it is a method of analysis by which a court compares the *relative* values of the things before it. A person often knows that "x" outweighs "y" even without first determining exactly what either "x" or "y" weighs. And it is this common experience that illustrates the workings of a *Pickering* balance.[19]

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[18] (...continued)
tended, in a religious celebration, to "marry" a woman and then to be known herself as a "married" woman was not erroneous.

We cannot say that the Attorney General acted unreasonably in relying on this information or in acting without his having spoken personally with Shahar. *See generally Waters v. Churchill*, 511 U.S. 661, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994). *See also Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1323 (11th Cir. 1989). As we see it, the Attorney General's not having met with Shahar is inconsequential to the *Pickering* balance.

[19] We are not the first court to assume the existence of a right and, then, to go on to apply the *Pickering* balancing test, taking into account the assumed right. *See e.g. Kemp v. State Bd. of Agric.*, 803 P.2d 498, 505 (Colo. 1990)(en banc), *cert. denied*, 501 U.S. 1205, 111 S.Ct. 2798, 115 L.Ed.2d 972 (1991)("Even assuming that [the employee's] right to petition was implicated, the *Pickering/Connick* balancing test is equally applicable in deciding whether the state's interest as an employer outweighs the [F]irst [A]mendment interest of the employee."); *Barnard v. Jackson Cty.*, 43 F.3d 1218, 1223 (8th Cir.1995)("Because we believe
(continued...)

To decide this case, we are willing to accord Shahar's claimed associational rights (which we have assumed to exist) substantial weight. But, we know that the weight due intimate associational rights, such as, those involved in even a state-authorized marriage, can be overcome by a government employer's interest in maintaining the effective functioning of his office. *See McCabe v. Sharrett*, 12 F.3d 1558, 1569-1570 (11th Cir. 1994)(upholding transfer of sheriff's secretary to less desirable job based on her marriage to an officer in sheriff's department).

In weighing her interest in her associational rights, Shahar asks us also to consider the "non-employment related context" of her "wedding" and "marriage" and that "[s]he took no action to transform her intimate association into a public or political statement." In addition, Shahar says that we should take into account that she has affirmatively disavowed a right to benefits from the Department based on her "marriage."

To the extent that Shahar disclaims benefits bestowed by the State based on marriage, she is merely acknowledging what is undisputed, that Georgia law does not and has not recognized homosexual marriage. *See* O.C.G.A. §§19-3-1; 19-3-3.1; *City of Atlanta v. McKinney*, 265 Ga. 161, 454 S.E.2d 517, 519 (1995)("We hold that the city . . . exceeded its authority in extending employee benefits to persons who are not dependents under state law."); *Georgia Osteopathic Hosp., Inc. v. O'Neal*, 198 Ga.App. 770, 403 S.E.2d 235, 243 (1991)("In order for a common-law marriage to come into existence, the parties must be able to contract, must

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[19] (...continued)
that the second component of the above test resolves the issues regarding Barnard's contacts with the Star, we assume without deciding that Barnard's speech with the Star touched upon matters of public concern, and we proceed to the *Pickering* balancing test.").

agree to live together as man and wife, and must consummate the agreement."). We fail to see how that technical acknowledgment counts for much in the balance.

If Shahar is arguing that she does not hold herself out as "married," the undisputed facts are to the contrary. Department employees, among many others, were invited to a "Jewish, lesbian-feminist, out-door wedding" which included exchanging wedding rings: the wearing of a wedding ring is an outward sign of having entered into marriage. Shahar listed her "marital status" on her employment application as "engaged" and indicated that her future spouse was a woman. She and her partner have both legally changed their family name to Shahar by filing a name change petition with the Fulton County Superior Court.[20] They sought and received the married rate on their insurance. And, they, together, own the house in which they cohabit. These things were not done secretly, but openly.

Even if Shahar is not married to another woman, she, for appearance purposes, might as well be. We suppose that Shahar could have done more to "transform" her intimate relationship into a public statement. But after (as she says) "sanctifying" the relationship with a large "wedding" ceremony by which she became -- and remains for all to see -- "married," she has done enough to warrant the Attorney General's concern.[21] He could conclude that her acts would

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[20] Under Georgia law, a person desiring a name change must "present a petition to the superior court of the county of his residence, setting forth fully and particularly the reasons why the change is asked, . . ." O.C.G.A §19-12-1(a). "Within seven days of the filing of the petition, the petitioner shall cause a notice of the filing, signed by him, to be published in the official legal organ of the county once a week for four weeks." O.C.G.A §19-12-1(b).

[21] We recognize that some of these acts (the exchange of rings, the in-

(continued...)

give rise to a likelihood of confusion in the minds of members of the public: confusion about her marital status and about his attitude on same-sex marriage and related issues.

As for disruption within the Department, Shahar argues that we may discount the potential harm based on (what she sees as) the weakness of the Attorney General's predictions. Shahar overstates the Attorney General's "evidentiary burden." *See Waters, supra* at 675-77, 114 S.Ct. at 1888 ("Government employers should be allowed to use personnel procedures that differ from the evidentiary rules used by courts, without fear that these differences will lead to liability.")

In *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), the Supreme Court upheld the termination of an assistant district attorney based on her exercise of her free speech rights. In so doing, the Court noted the close working relationship involved in a district attorney's office (which we think is similar to the Department) and held as follows:

> When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the

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[21] (...continued)
surance and property ownership) may not have been known by the Attorney General when he decided to withdraw Shahar's job offer. We can still consider them. First, these additional facts do not change the reason -- Shahar's "wedding" and "marriage" -- for the withdrawal of the job offer. Second, in balancing the Attorney General's interests with Shahar's, the facts of Shahar's subsequent conduct are evidence of the reasonableness of the Attorney General's concerns (about potential public knowledge and perception) at the time he made his decision. By the way, Shahar has requested "reinstatement" as part of her "relief." "After-acquired evidence" can be especially relevant in that context. *McKennon v. Nashville Banner Publ. Co.*, 513 U.S. 352, 362, 115 S.Ct. 879, 886, 130 L.Ed.2d 852 (1995).

> necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.

Id. at 150-52, 103 S.Ct. at 1692. *See also Waters*, 511 U.S. at 673-75, 114 S.Ct. at 1887 ("[W]e have given substantial weight to government employers' reasonable predictions of disruption, . . . even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential.")

As we have already written, the Attorney General's worry about his office being involved in litigation in which Shahar's special personal interest might appear to be in conflict with the State's position has been borne out in fact. *See supra*, note 16. This worry is not unreasonable. In addition, the Department, when the job offer was withdrawn, had already engaged in and won a recent battle about homosexual sodomy -- highly visible litigation in which its lawyers worked to uphold the lawful prohibition of homosexual sodomy. This history makes it particularly reasonable for the Attorney General to worry about the internal consequences for his professional staff (for example, loss of morale, loss of cohesiveness and so forth) of allowing a lawyer, who openly -- for instance, on her employment application and in statements to coworkers -- represents herself to be "married" to a person of the same sex, to become part of his staff. Doubt and uncertainty of purpose can undo an office; he is not unreasonable to guard against that potentiality.

Shahar also argues that, at the Department, she would have handled mostly death penalty appeals and that the *Pickering* test requires evidence of potential interference with these particular duties. Even assuming Shahar is correct about her likely assignment within the Department, a

particularized showing of interference with the provision of public services is not required. *Waters*, 511 U.S. at 673-75, 114 S.Ct. at 1887 ("Few of the examples [of government employers restricting protected speech] we have discussed involve tangible, present interference with the agency's operation. The danger in them is mostly speculative.") In addition, the Attorney General must be able to reassign his limited legal staff as the needs of his office require. As the Third Circuit said in *Ness v. Marshall*, 660 F.2d 517, 521-522 (3d Cir. 1981):

> That a city solicitor could conceivably operate in such a legal/technical manner is a possibility that need not concern us here. Neither need we decide whether the plaintiffs in fact limited themselves to the role they described .... Under the Administrative Code it is contemplated that a mayor might rely upon the city solicitors for the legal advice necessary to implement policy.

In a similar way, it is not for this court to tie the Department's hands by telling it which Staff Attorneys may be assigned to which cases or duties or to force upon the Attorney General a Staff Attorney of limited utility. Such an interference by the federal judiciary into the internal organization of the executive branch of a state government is almost always unwarranted. *Cf. Mayor of Phila. v. Educational Equality League*, 415 U.S. 605, 613-17, 94 S.Ct. 1323, 1330-1331, 39 L.Ed.2d 630 (1974)("[T]o the degree that the principles cited by the Mayor reflect concern that judicial oversight of discretionary appointments may interfere with the ability of an elected official to respond to the mandate of his constituency, they are on point.").

D.

As we have already touched upon, the Attorney Gener-

al, for balancing purposes, has pointed out, among other things, his concern about the public's reaction -- the public that elected him and that he serves -- to his having a Staff Attorney who is part of a same-sex "marriage." Shahar argues that he may not justify his decision by reference to perceived public hostility to her "marriage." We have held otherwise about the significance of public perception when law enforcement is involved. In *McMullen v. Carson*, 754 F.2d 936 (11th Cir. 1985), we held that a sheriff's clerical employee's First Amendment interest in an off-duty statement that he was employed by the sheriff's office and also was a recruiter for the Ku Klux Klan was outweighed by the sheriff's interest in esprit de corps and credibility in the community the sheriff policed. More important, we relied, in large part, on public perceptions of the employee's constitutionally protected act. *Id.* at 938-940.[22]

In *McMullen*, both public perception and the anticipated effect that the employee's constitutionally protected activity would have on cohesion within the office were crucial in tipping the scales in the sheriff's favor. Nothing indicates that the employee had engaged in a criminal act or that he had joined an organization (he had joined the Invisible Em-

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[22] The Supreme Court later cited *McMullen* with approval, in *Rankin v. McPherson*, 483 U.S. 378, 391 n.18, 107 S.Ct. 2891, 2901 n.18, 97 L.Ed.2d 315 (1987), as follows:

> This is not to say that clerical employees are insulated from discharge where their speech, taking the acknowledged factors into account, truly injures the public interest in the effective functioning of the public employer. *Cf. McMullen v. Carson*, 754 F.2d 936 (C.A.11 1985)(clerical employee in sheriff's office properly discharged for stating on television news that he was an employee for the sheriff's office and a recruiter for the Ku Klux Klan).

pire[23] that had engaged in any criminal act. Given that it was additionally undisputed that neither the employee's statements nor his protected expressive association hindered his ability to perform his clerical duties and that the specific clerk "performed his duties in exemplary fashion," *id.* at 937, the two factors -- public perception and anticipated effect -- seemed to be the only ones weighing on the sheriff's side of the scale. *Id.* at 938 ("The fundamental question here is whether plaintiff can be fired for his Klan beliefs and activities just because of the violent public reaction to his employment . . . ."). But that was enough.

This case is different from *McMullen* in some ways, but *McMullen* guides us about the significance of "public perception." In this case, the Attorney General was similarly entitled to consider any "deleterious effect on [his] ability to enforce the law of the community," *id.*, and that "[u]nder our system of Government, that duty [law enforcement] can be performed only with the consent of the vast majority . . . . Efficient law enforcement requires mutual respect, trust and support." *Id.* at 939.

The Attorney General was also entitled to conclude that the public may think that employment of a Staff Attorney who openly purports to be part of a same- sex "marriage" is, at best, inconsistent with the other positions taken or likely to be taken by the Attorney General as the state's chief legal

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[23] About perceptions, we wrote these words: "Although the Invisible Empire is just one of the various Klan organizations in the country, the *public* makes no distinctions in its perception of the Klan as a monolithic entity." *McMullen*, 754 F.2d at 938 (emphasis added). We also said this about the employer's duty to wait for events to unfold: "Plaintiff suggests Sheriff Carson acted too swiftly, that actual public perception should have been tested before taking any action. Carson responded that based on his 27 years of experience with the Jacksonville Sheriff's Office, he knew all too well what the reaction would be . . . . There was no reason for Carson to wait in this type of situation." *Id.* at 939.

officer. The Attorney General has a right to take steps to protect the public from confusion about his stand and the Law Department's stand on controversial matters, such as same-sex marriage.

Public perception is important; but, at the same time, it is not knowable precisely. That the public (which we know is rarely monolithic) would not draw the Attorney General's anticipated inferences from Shahar's "marriage" or, at least, would not attribute such perceptions to the Department or the Attorney General is a possibility.[24] But assessing what the public perceives about the Attorney General and the Law Department is a judgment for the Attorney General to make in the day-to-day course of filling his proper role as the elected head of the Department, not for the federal judiciary to make with hindsight or from a safe distance away from the distress and disturbance that might result if the decision was mistaken. We must defer to Georgia's Attorney General's judgment about what Georgians might perceive unless his judgment is definitely outside of the broad range of reasonable views. Nothing that either the Supreme Court or this circuit has held in applying the *Pickering* test leads us to a different conclusion. *See e.g., Waters v. Churchill*, 511 U.S. 661, 673-75, 114 S.Ct. 1878, 1887, 128 L.Ed.2d 686 (1994)(plurality opinion); *Connick v. Myers*, 461 U.S. 138, 154-56, 103 S.Ct. 1684, 1694, 75 L.Ed.2d 708 (1983).

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[24] The Attorney General's sense that Georgia's people, in general, are set against equating in some way a relationship between persons of the same sex with traditional marriage seems to have been corroborated by O.C.G.A. §19- 3-3.1 (prohibiting same-sex marriage) and by 1 U.S.C §7 (defining marriage as consisting of a man and a woman) and 28 U.S.C. §1738C (giving states the power to refuse to recognize same-sex marriages entered into in other states). The federal statutes became law with the support of both of Georgia's senators and ten of Georgia's twelve Members of the House of Representatives and were sponsored by a Georgia Member of the House of Representatives.

Shahar says that by taking into account these concerns about public reaction, the Attorney General impermissibly discriminated against homosexuals; and she refers us to the Supreme Court's recent decision in *Romer v. Evans*, ___ U.S. ___, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). In *Romer*, the Supreme Court struck down an amendment to a state constitution as irrational because the amendment's sole purpose was to disadvantage a particular class of people (to "den[y] them protection across the board," *id.* at ___, 116 S.Ct. at 1628) and because the government engaged in "classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Id.* at ___, 116 S.Ct. at 1629.

Romer is about people's condition; this case is about a person's conduct.[25] And, *Romer* is no employment case. Considering (in deciding to revoke a job offer) public reaction to a future Staff Attorney's conduct in taking part in a same-sex "wedding" and subsequent "marriage" is not the same kind of decision as an across-the-board denial of legal protection to a group because of their condition, that is, sexual orientation or preference.[26]

III

This case is about the powers of government as an employer, powers which are far broader than government's

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[25] We also note that in deciding *Romer*, the Court did not overrule or disapprove (or even mention) *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), which was similarly about conduct in that it held that the State of Georgia did not violate "substantive due process" in prosecuting homosexual sodomy as a crime.

[26] Neither *Romer* nor any other case in which a state government (acting as sovereign) violated the Equal Protection Clause of the Fourteenth Amendment by giving effect to private prejudice, *see e.g. Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984), convinces us otherwise.

powers as sovereign. In addition, the employment in this case is of a special kind: employment involving access to the employer's confidences, acting as the employer's spokesperson, and helping to make policy. This kind of employment is one in which the employer's interest has been given especially great weight in the past. Furthermore, the employment in this case is employment with responsibilities directly impacting on the enforcement of a state's laws: a kind of employment in which appearances and public perceptions and public confidence count a lot.

Particularly considering this Attorney General's many years of experience and Georgia's recent legal history, we cannot say that he was unreasonable to think that Shahar's acts were likely to cause the public to be confused and to question the Law Department's credibility; to interfere with the Law Department's ability to handle certain controversial matters, including enforcing the law against homosexual sodomy; and to endanger working relationships inside the Department. We also cannot say that the Attorney General was unreasonable to lose confidence in Shahar's ability to make good judgments as a lawyer for the Law Department.

We stress in this case the sensitive nature of the pertinent professional employment. And we hold that the Attorney General's interest -- that is, the State of Georgia's interest -- as an employer in promoting the efficiency of the Law Department's important public service does outweigh Shahar's personal associational interests.

We do not decide today that the Attorney General did or did not do the right thing when he withdrew the pertinent employment offer. That decision is properly not ours to make. What we decide is much different and less: For the Law Department's professional staff, Georgia's Attorney General has made a personnel decision which none of the asserted federal constitutional provisions prohibited him

from making.[27]

AFFIRMED.

TJOFLAT, Circuit Judge, specially concurring:

I join the court's judgment affirming the district court's rejection of Robin Shahar's claim that Attorney General Michael Bowers withdrew his offer of employment because she is a homosexual and thus denied her the equal protection of the laws in violation of the Fourteenth Amendment. I do so because, as the court concludes, the record does not permit the inference that the Attorney General's decision was based on her homosexual status.

I also join the court's judgment with respect to Shahar's

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[27] That the Attorney General did not revoke Shahar's offer because of her religious affiliation or her religious beliefs (as opposed to her conduct) is plain from the record. Assuming *arguendo* that the Attorney General's decision to revoke Shahar's offer did implicate her Free Exercise rights, we believe that *Pickering* balancing applies, *see e.g. Brown v. Polk County, Iowa*, 61 F.3d 650, 658 (8th Cir. 1995)(*en banc*), and that the Attorney General prevails in that balance for the reasons discussed above. In addition, several of us also doubt that a facially neutral executive act which adversely impacts on the exercise of one's religion either constitutes a violation of the Free Exercise Clause or requires heightened scrutiny. *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 449-51, 108 S.Ct. 1319, 1326, 99 L.Ed.2d 534 (1988)(government's ability to carry out its policies "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development"). We affirm the district court's holding denying Shahar's free exercise claim.

The district court also held that the record supports no reasonable inference that the Attorney General revoked Shahar's offer because of her sexual orientation -- as opposed to her conduct in "marrying" another woman. Because Shahar fails to point us to enough evidence to support such an inference, we also affirm the district court's holding on Shahar's equal protection claim.

remaining claims, all brought under the First and Fourteenth Amendments -- that the Attorney General withdrew the offer because of Shahar's intimate association with her lesbian partner and because Shahar participated in a religious wedding ceremony with her partner.[1] This latter claim is couched as two claims: a claim that Shahar's participation in the ceremony constituted an exercise of religion on her part, and a claim that such exercise was a purpose of her and her partner's expressive association. The court rejects all of these claims by assuming the existence of the alleged constitutional right and then, under *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), balancing the assumed right against the Attorney General's governmental interest in the efficient operation of the Department of Law.[2]

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[1] The record in this case supports an inference that the Attorney General withdrew Shahar's offer of employment because he thought Shahar had "set him up;" once ensconced in the Department of Law office, she would use her position to advance a homosexual-rights agenda among her co-employees. Had the Attorney General's decision been motivated by this concern, Shahar may have had a free speech claim. *See, e.g., Connick v. Myers*, 461 U.S. 138, 150-54, 103 S.Ct. 1684, 1692-93, 75 L.Ed.2d 708 (1983) (applying *Pickering* to a district attorney's decision to discharge a deputy because her speech on a matter of public concern disrupted the district attorney's office). Shahar, however, did not present a free speech claim to the district court; consequently, such a claim is not involved in this case.

[2] Shahar's complaint sought (for each of her claims) injunctive relief (an order requiring the Attorney General to reinstate the offer of employment) and money damages. In his answer, the Attorney General pled qualified immunity as an affirmative defense to Shahar's prayers for money damages. The district court did not pass on this defense because it concluded that the record disclosed no constitutional violation. In this appeal, the Attorney General does not ask us to affirm the district court's summary judgment with respect to the damages aspect of the case on the alternative ground that he is entitled to qualified immunity.

The court engages in *Pickering* balancing in an effort to avoid the question whether the Constitution protects the First and Fourteenth Amendment rights Shahar seeks to enforce. I agree that constitutional questions should be answered only when necessary to the resolution of the case. *See Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445-46, 108 S.Ct. 1319, 1323-24, 99 L.Ed.2d 534 (1988); *Ashwander v. TVA*, 297 U.S. 288, 346- 48, 56 S.Ct. 466, 482-83, 80 L.Ed. 688 (1936)(Brandeis, J., concurring). In this case, however, I believe the court must reach the constitutional question in order to determine under *Pickering* whether the Attorney General's action was lawful. As I explain below, the court must describe qualitatively the constitutional right it is placing on the scale in order to determine whether, on balance, the government's interest is to prevail. The court does not do this -- it does not tell us, with respect to each of Shahar's remaining claims, where the assumed right ranks in the constitutional hierarchy.[3]

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[3] The court contends that this is unnecessary because

> *Pickering* balancing is never a precise mathematical process: it is a method of analysis by which a court compares the relative values of the things before it. A person often knows that "x" outweighs "y" even without first determining exactly what either "x" or "y" weighs. And it is this common experience that illustrates the workings of a *Pickering* balance.

Ante at 1106.

The court cites two cases for the proposition that other courts have balanced under *Pickering* a government employer's interest against an employee's assumed constitutional right. The first case, *Kemp v. State Bd. of Agric.*, 803 P.2d 498 (Colo.1990), *cert. denied*, 501 U.S. 1205, 111 S.Ct. 2798, 115 L.Ed.2d 972 (1991), is, in my view, inapposite. In *Kemp*, the plaintiff, an employee of Colorado State University who claimed that sex and race discrimination resulted in "a salary increase she felt was too low," *id.* at 500, invoked the university's formal griev-

(continued...)

[3] (...continued)
ance procedure and chose to have her grievance heard in a closed rather than in an open proceeding. While the proceeding was underway, she wrote one of her U.S. Senators complaining about irregularities in the proceeding. When the office in charge of investigating her allegations learned that she had brought an outside party into the picture, he terminated the proceeding. The university president affirmed the officer's decision. The employee then sued the university and others, seeking unspecified injunctive relief and money damages. *Kemp v. State Bd. of Agric.*, 790 P.2d 870 (Colo. Ct.App.1989).

The question before the court was whether the university's closed hearing procedure, which "clearly indicate[d] that outside forces may not be invited into the proceedings until a decision has been rendered," *Kemp*, 803 P.2d at 504-505, violated the employee's First Amendment rights of free speech and petition of grievances. The Colorado Supreme Court chose to decide the question by engaging in *Pickering* balancing instead of determining whether the employee had waived her rights of free speech and of petition by voluntarily choosing to have her grievance decided in a closed proceeding. Applying *Pickering* to the employee's claims, the court had no problem determining that her speech was not a matter of public concern under *Connick* and that *Pickering* therefore did not protect the employee. The court then faced the novel question of whether *Pickering* applied to First Amendment petition claims. The court assumed that the employee's right to petition was implicated when she contacted her senator and concluded that she had "no stronger interest [under the Petition Clause] than [she] had under the Free Speech Clause." *Id.* at 506. Thus, while the court assumed the existence of the right, it assigned the right the maximum weight possible -- the same weight accorded speech on a matter of public concern. If, in the case at hand, the court is going to assume that Shahar's relationship with her partner constitutes an intimate association under the First Amendment, the court should do as the Colorado Supreme Court did and give it the highest weight possible, the weight given heterosexual marriage.

The other case in which an employee's right was assumed is *Barnard v. Jackson County*, 43 F.3d 1218 (8th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 53, 133 L.Ed.2d 17 (1995). There, an auditor hired by a county legislature to perform an internal audit of the county's agencies and offices leaked the results of his audit to the press. When the legisla-
(continued...)

Pickering balancing, in the public employment context, involves the weighing of the employee's interest in the exercise of a constitutional right against the employer's interest in maintaining an efficient workplace.[4] The employee has

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[3] (...continued)
tors learned what he had done, they terminated his employment. In striking a *Pickering* balance, the court assumed that the leak was speech on a matter of public concern. *Barnard* differs from the instant case in that the right the Eighth Circuit assumed and the weight to be accorded to it were well established. In the instant case, while the existence of the right of intimate association has been established, the nature of the right outside of the marital/familial context and the weight such right should be accorded are not well established. Again, the court's assumption in that case tells us to what weight the right is entitled. The court's opinion in the instant case should do the same.

[4] *Pickering* was a free speech case: a public high school teacher claimed that his employer fired him because he sent a letter to a local newspaper. The letter was critical of the way that Board of Education and superintendent had handled political issues related to education. 391 U.S. at 564-66, 88 S.Ct. at 1732-33. The Supreme Court concluded that the employer's action was lawful only if its interests as an employer outweighed the teacher's interest in exercising his free speech right.

Some courts have extended *Pickering* balancing to scrutinize adverse employment decisions made on account of the employee's exercise of other constitutionally protected rights. *See, e.g., Hatcher v. Board of Pub. Educ. and Orphanage*, 809 F.2d 1546, 1559 (11th Cir. 1987)(applying *Pickering* to an expressive association claim); *Stough v. Crenshaw County Bd. of Educ.*, 744 F.2d 1479, 1480-82 (11th Cir. 1984)(applying *Pickering* to parents' "constitutional right to control the education of their children"); *Brown v. Polk County*, 61 F.3d 650, 658-59 (8th Cir. 1995)(en banc)(applying *Pickering* to a free exercise of religion claim), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1042, 134 L.Ed.2d 189 (1996); *Sullivan v. Meade Independent School District No. 101*, 530 F.2d 799, 804-06 (8th Cir. 1976)(suggesting that *Pickering* would apply to association claim and substantive due process privacy claim). I do not criticize the court for extending *Pickering* to claims of intimate association, expressive association, and free exercise. My criticism is with the way in which the court applies *Pickering* to the assumed rights in this case.

exercised a constitutional right, and the employer, concluding that such exercise seriously has impaired, or will impair, the ability of the workplace to function properly, makes an employment decision adverse to the employee. In order to decide whether the employer's decision was justified, the court places the interest of the employer on one side of a "scale" and the interest of the employee on the other side. If the employer's interest outweighs the employee's, the employer prevails. *Pickering* balancing does not apply where the employee's constitutionally protected conduct did not motivate the employer's decision. In such a case, balancing is not necessary; the employer prevails because the employee has not established the element of causation. *See, e.g., Board of County Comm'rs v. Umbehr*, ___ U.S. ____, ____, 116 S.Ct. 2342, 2347, 135 L.Ed.2d 843 (1996); *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84, 97 S.Ct. 568, 574, 50 L.Ed.2d 471 (1977); *McCabe v. Sharrett*, 12 F.3d 1558, 1562 (11th Cir. 1994).

When a court engages in *Pickering* balancing, it must identify the constitutional source of the right the employee exercised and assign weight to that right. Otherwise, balancing cannot occur. It cannot occur any more than the local butcher can weigh five pounds of hamburger without placing a five pound weight on the other side of the scale. In the case at hand, the court, with respect to each of Shahar's claims, assumes Shahar's exercise of a constitutional right without describing the right and telling us the weight it has assigned to it.[5] It then places on the other side of the scale the Attorney General's interest in operating an effi-

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[5] Nor does the court identify a causal link between Shahar's exercise of the right in question and the Attorney General's withdrawal of the offer of employment. As pointed out above, there is no need to engage in *Pickering* balancing if it has not been shown that the adverse employment decision was caused by the employee's exercise of the constitutional right.

cient Department of Law that can command the public's respect, and concludes that such interest outweighs what the court has assumed and placed on Shahar's side of the scale.

I submit that if one assumes that the First Amendment protects the homosexual relationship between Shahar and her partner as an intimate association, summary judgment on the intimate association claim was inappropriate on the record before us. Thus, I reach the question whether that relationship has First Amendment protection. I conclude that it does not. As for Shahar's claims that the Attorney General based his employment decision on Shahar's participation in the religious wedding ceremony and thus infringed her rights of free exercise of religion and expressive association, I conclude that the claims fail for want of proof that the religious nature of that ceremony motivated, in whole or in part, the Attorney General's decision. I turn first to Shahar's intimate association claim.

I.

A.

Shahar argues that the Attorney General's withdrawal of the offer of employment violated her right to intimate association with her partner. The Supreme Court articulated the right to intimate association in *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984), recognizing that its prior decisions "afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Id.* at 618, 104 S.Ct. at 3250.[6] The Court explained that relationships "that attend

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[6] As the court notes, the Supreme Court has formally located the right of intimate association within the First Amendment. *See Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545-47, 107 S.Ct.

(continued...)

the creation and sustenance of a family -- marriage, childbirth, the raising and education of children, and cohabitation with one's relatives" are the type of relationships afforded protection as intimate associations. *Id.* at 619, 104 S.Ct. at 3250 (citations omitted).

The Court has since explained that "we have not held that constitutional protection is restricted to relationships among family members." *Rotary Int'l*, 481 U.S. at 545, 107 S.Ct. at 1946. On the other hand, the Court has also stated that "we do not think the Constitution recognizes a generalized right of 'social association.' " *City of Dallas v. Stanglin*, 490 U.S. 19, 25, 109 S.Ct. 1591, 1595, 104 L.Ed.2d 18 (1989).

The Court in *Roberts* provided some guidance in determining which relationships are entitled to protection as intimate associations. *Roberts* provides a list of "factors that may be relevant [to determining whether a given relationship constitutes an intimate association], includ[ing] size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." 468 U.S. at 620, 104 S.Ct. at 3251. While these factors may be relevant, I believe that courts must also determine whether

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[6] (...continued)
1940, 1945-46, 95 L.Ed.2d 474 (1987). The cases cited by *Roberts*, however, are substantive due process cases. Because of this confusion, there exists a split among the circuits as to whether the right of intimate association is a First Amendment or substantive due process right. *Compare Griffin v. Strong*, 983 F.2d 1544, 1547 (10th Cir. 1993)(holding that the right of intimate association is "properly based on the concept of liberty in the Fourteenth Amendment")(quotation marks and citation omitted), and *Krafft v. Jacka*, 872 F.2d 862, 871 (9th Cir. 1989)(same); *with Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1051 (5th Cir. 1996) (holding that the right of intimate association is a First Amendment right). I do not believe that this question affects my analysis here, and therefore do not address the issue further.

the asserted relationship has "played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs." *Id.* at 618-19, 104 S.Ct. at 3250.

In its most recent case to address the issue of intimate association, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), the Court evaluated a claim that a municipal ordinance that required a license for any motel renting rooms for fewer than ten hours violated a hotel patron's intimate association rights. There, the Court held that

> we do not believe that limiting motel room rentals to 10 hours will have any discernible effect on the sorts of traditional personal bonds to which we referred in *Roberts*. Any "personal bonds" that are formed from the use of a motel room for fewer than 10 hours are not those that have "played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs."

Id. at 237, 110 S.Ct. at 599 (quoting *Roberts*, 468 U.S. at 618-19, 104 S.Ct. at 3249-50). This passage illustrates the Court's view that "the culture and traditions of the Nation" are critical to the determination of whether a particular relationship is entitled to protection as an intimate association.

The cases *Roberts* cites as examples of relationships that are protected as intimate associations further indicate the crucial importance of "the culture and traditions of the Nation." In *Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), the Court traced the long line of cases extending from the nineteenth century to the present recognizing the fundamental character of marriage. Citing

Maynard v. Hill, 125 U.S. 190, 205, 211, 8 S.Ct. 723, 726, 729, 31 L.Ed. 654 (1888), the *Zablocki* Court noted that marriage is "the most important relation in life and [is] the foundation of the family and society, without which there would be neither civilization nor progress." *Zablocki*, 434 U.S. at 384, 98 S.Ct. at 680 (quotation marks and citations omitted).

The Court noted in *Smith v. Organization of Foster Families for Equality and Reform*, that "the liberty interest in family privacy has its source . . . in intrinsic human rights, as they have been understood in this Nation's history and traditions." 431 U.S. 816, 845, 97 S.Ct. 2094, 2110, 53 L.Ed.2d 14 (1977)(quotation marks omitted). In *Carey v. Population Servs. Int'l*, the Court explained that "[t]he decision whether or not to beget or bear a child is at the very heart of th[e] cluster of constitutionally protected choices" about family, childrearing, and conception. 431 U.S. 678, 685, 97 S.Ct. 2010, 2016, 52 L.Ed.2d 675 (1977). Finally, in *Moore v. City of East Cleveland*, a plurality of the Court observed that "[o]ur decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." 431 U.S. 494, 503-04, 97 S.Ct. 1932, 1938, 52 L.Ed.2d 531 (1977)(footnotes omitted).

These cases, coupled with the Court's holding in *FW/PBS*, lead to the conclusion that in order to find that Shahar's relationship is protected as an intimate association, we must find that homosexual relationships have "played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs."

I conclude that this simply is not the case. Shahar has pointed to nothing to suggest that homosexual relationships

have played a critical role in our history and tradition. On the contrary, the Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), suggests that homosexual relationships have not played such a role. In that case the Court concluded that there is no fundamental right to engage in homosexual sodomy. *Id.* at 190-96, 106 S.Ct. at 2843-47. In arriving at that conclusion, the Court stated that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated." *Id.* at 191, 106 S.Ct. at 2844. The Court concluded that "to claim that a right to engage in [homosexual sodomy] is deeply rooted in this Nation's history and tradition or implicit in the concept of ordered liberty is, at best, facetious." *Id.* at 194, 106 S.Ct. at 2486 (quotation marks omitted).[7]

Homosexual relationships have not played the same role as marital or familial relationships in the history and traditions of the Nation. Shahar's relationship with her partner is not a "fundamental element of personal liberty" protected as an intimate association. As a result, Shahar fails to state a claim that her right to intimate association has been violated. Summary judgment on this claim was therefore appropriate.

B.

The court purports to avoid this constitutional decision by assuming that Shahar's relationship constitutes a protec-

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[7] The fact that *Hardwick* addressed homosexual conduct does not undermine this conclusion. The cases I discuss above address conduct as well: the right to get married and the right to have and raise one's children. Moreover, homosexual conduct is as central to a homosexual "marriage" as heterosexual intercourse is to a heterosexual marriage. The suggestion that homosexual relationships have played a role in our history and traditions while acknowledging that homosexual conduct has played no role in them would be "at best, facetious."

ted intimate association and then, by engaging in *Pickering* balancing, concluding that the Attorney General's interests outweigh Shahar's interest in her intimate association. As I stated earlier, a court cannot engage in *Pickering* balancing without identifying the constitutional source of the employee's right and assigning the right a weight or constitutional value. The court points to the First Amendment as the source of the right of intimate association. It does not, however, indicate the weight it assigns to Shahar's assumed intimate association. The court simply sidesteps this issue. Instead, after assuming for the sake of argument that Shahar has a right of intimate association, the court, observing that the right is "not absolute," *ante* at 1102, concludes that the Attorney General's interest outweighed Shahar's and that his "act -- as an employer -- was still lawful." *Ante* at 1100.

I suggest that if the court is going to assume that Shahar's relationship with her partner is a protected intimate relationship, the court ought to assume that it is "a fundamental element of personal liberty," *Roberts*, 468 U.S. at 618, 104 S.Ct. at 3249, protected because it is "deeply rooted in this Nation's history and tradition."[8] *Moore*, 431 U.S. at 503, 97 S.Ct. at 1938; *see supra* n.3. A reasonable trier of

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[8] Shahar contends that her "intimate association is of the type most central to that personal liberty. Shahar's interests in creating and maintaining her primary, familial relationship with her partner warrant the greatest weight possible for intimate associations in the *Pickering* analysis." Reply Brief at 41. Her relationship with her partner "exemplifies the First Amendment values behind the right of intimate association and weighs heavily on her side of the *Pickering* scale as a core protected activity." Reply Brief at 19. Its "purpose was to create a family," Appellant's Brief at 23; thus, her "committed union with her female partner is precisely the type of intimate human relationship that the Constitution most strongly protects," *id.* at 22. In sum, according to Shahar, the relationship is entitled to the same protection as those relationships explicitly identified by the Supreme Court in *Roberts*: marriage and familial relationships.

fact could find from the record in this case that the Attorney General's decision was motivated not by the fact that Shahar is a homosexual, but because she and her partner were maintaining an open homosexual relationship.[9] Thus, unless the Attorney General would prevail as a matter of law in a *Pickering* balance, summary judgment was inappropriate. I believe that it is likely that Shahar would prevail in such a balance.

If Shahar's relationship is entitled to the same level of protection as is a heterosexual marriage, I doubt whether the public perception of that relationship, or the State of Georgia's public policy against according such relationships the same protections and privileges as heterosexual marriage, would be placed on the government's side of the scale. Even if those factors were weighed in the balance, it is difficult to imagine that they would outweigh Shahar's interest in her relationship.

A hypothetical will illustrate the point. Suppose that Shahar had married a man of another race rather than "marrying" a woman. Such a relationship would clearly be protected as an intimate association. *See Roberts*, 468 U.S. at 620, 104 S.Ct. at 3251 (citing *Loving v. Com. of Virginia*,

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[9] A reasonable trier of fact could also find that the Attorney General withdrew Shahar's offer because he could not trust her; during a telephone conversation in June 1991, Shahar misled Deputy Attorney General J. Robert Coleman into believing that she was going to marry a male. A reasonable trier of fact could also or alternatively find that the Attorney General, as he explained to the Dean of the Emory Law School in a letter contained in the record of this case below, withdrew the offer because he thought that Shahar had set him up and planned to use him to advance a homosexual- rights agenda. With either finding, Shahar's asserted intimate association claim, as well as her other claims, would fail for lack of proof of causation; that is, the trier of fact would have determined that the Attorney General's action was not motivated by Shahar's constitutionally protected activity.

388 U.S. 1, 12, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967)). I believe that a court engaged in a *Pickering* balance would either (1) refuse to consider as government interests the public perception of such a relationship or any state policy positions hostile toward that relationship, or (2) conclude that such governmental interests do not prevail in the balance. In short, if the court accords Shahar's relationship the same constitutional value that the Supreme Court has assigned to heterosexual marriage, the Attorney General would face a heavy burden in prevailing in a *Pickering* balance.[10]

The court could have assumed that Shahar's intimate association right has less weight than that accorded intimate associations rooted in the Nation's history and tradition.[11]

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[10] Moreover, whether the Attorney General would have the benefit of his qualified immunity defense would be problematic. By not raising the issue in this appeal as a ground for affirming the district court's summary rejection of the damages aspect of the case, the Attorney General may be deemed to have abandoned that defense.

[11] For example, the court could have seized upon language in *Roberts* which suggests that, in addition to fundamental liberty interests such as marriage and familial relationships, all human relationships constitute liberty interests. These relationships can be arrayed on a spectrum with marital and familial relationships at one end and business relationships at the other. "Between these polls, of course, lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State." *Roberts*, 468 U.S. at 620, 104 S.Ct. at 3251. Having seized on this language, the court could have located Shahar's relationship with her partner at some point on this spectrum between marital/familial relationships and business relationships. Then the court could have addressed the question whether the relationship is such that *Pickering* balancing was required.

Had this been the court's approach, I would have suggested that the court look to *Connick* for an answer. *Connick* addressed the question of the scrutiny a court should apply in determining whether a public em-

(continued...)

[11] (...continued)
ployer's decision to discharge an employee on account of her speech violated the First Amendment. The Supreme Court distinguished between speech involving a matter of public concern and speech involving a matter of personal concern. With respect to the former, the Court held that the employer's action must be evaluated under *Pickering*. This is because "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." 461 U.S. at 145, 103 S.Ct. at 1689 (quotation marks omitted). With respect to speech not involving matters of public concern, the Court held that "it is unnecessary for [courts] to scrutinize the reasons for [the employer's decision]." *Id.* at 146, 103 S.Ct. at 1690. The Court, however, did "not suggest [that this type of speech] is totally beyond the protection of the first Amendment." *Id.* at 147, 103 S.Ct. at 1690.

The Court decided not to scrutinize purely private speech because "government offices could not function if every employment decision became a constitutional matter." *Id.* at 143, 103 S.Ct. at 1688. For this reason,

> government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.

Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.

Id. at 146-47, 103 S.Ct. at 1690.

> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. at 147, 103 S.Ct. at 1690.

(continued...)

From my reading of its opinion, however, it did not do so. Even if we were to accord Shahar's right a lesser constitutional value, the *Pickering* balancing problem would persist: precisely what weight would we place on Shahar's side of the scale? In sum, I fail to see how the court can avoid the constitutional question whether Shahar's relationship with her partner is protected under the First and Fourteenth Amendments. For this reason, I cannot ascribe to the court's analysis of her intimate association claim.

II.

Before reaching the issue of whether *Pickering* applies to Shahar's free exercise of religion claim, the court must determine whether the record permits the inference that Shahar's participation in the "wedding" ceremony constituted an exercise of her sincere religious beliefs. *See, e.g., Frazee v. Illinois Dep't. of Employment Sec.*, 489 U.S. 829, 834, 109 S.Ct. 1514, 1517-18, 103 L.Ed.2d 914 (1989)(holding that First Amendment protection extends not merely to a claimant "responding to the commands of a particular religious organization" but also to a claimant exercising a "sincerely held religious belief."). In addition, the court must determine that the record permits the inference that Shahar's religious exercise motivated the Attorney General's decision.[12]

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[11] (...continued)

If Shahar's relationship with her partner does not occupy "the highest rung of the hierarchy of First Amendment values" such that it is "entitled to special protection," the court could have held that the Attorney General's action is beyond scrutiny. For if his action is subject to scrutiny in this case, then any adverse employment decision allegedly based on a relationship within the *Roberts* spectrum would also be subject to scrutiny. The *Connick* Court sought to avoid this result.

[12] The court explains that because Shahar's religion does not "require" her to marry a woman, "considerable doubt also exists that she has a

(continued...)

See Mt. Healthy, 429 U.S. at 283-84, 97 S.Ct. at 574.

Similarly, Shahar must establish that the Attorney General was motivated by the religious nature of her "wedding" ceremony in order to reach the question of whether *Pickering* applies to Shahar's expressive association claim. In *Roberts*, the Supreme Court recognized that it has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others" for purposes of engaging in those First Amendment activities. 468 U.S. at 622, 104 S.Ct. at 3252. Here, the alleged First Amendment activity for which Shahar and her partner associated was the free exercise of religion: their participation in a religious "wedding" ceremony.

While the record does establish that Shahar was engaged in the exercise of her religion, there is no evidence that the religious nature of the ceremony motivated the Attorney General's decision. The record establishes that homosexual "marriages" are recognized by a part of the Reconstructionist movement of the Jewish faith. In addition, the record shows that Shahar and her partner are life-long Jews and that they have been active in a Jewish congregation which ministers to homosexuals and recognizes homosexual "marriages." Shahar's wedding ceremony was per-

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[12] (...continued)
constitutionally protected federal right to be 'married' to another woman to engage in her religion." *Ante* at ___. I have found no authority for the proposition that the Free Exercise Clause protects only those activities which a person's religion commands him or her to perform. I believe that Supreme Court precedent is to the contrary. *See, e.g., Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 886-87, 110 S.Ct. 1595, 1604-05, 108 L.Ed.2d 876 (1990)(noting that "[r]epeatedly and in many different contexts, [the Supreme Court has] warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim").

formed by a rabbi and was otherwise quite similar to a traditional Jewish wedding between a man and a woman. These facts establish that Shahar's wedding ceremony was an exercise of her religion: she participated in a "wedding" ceremony that was in accord with her sincere religious beliefs.

The record, however, is devoid of evidence which would show that the Attorney General was motivated by the religious nature of Shahar's marriage ceremony. The record shows that the Attorney General was aware that Shahar planned to engage in a "big or church" wedding. In addition, the Attorney General discussed with one of his staff members whether such a marriage would be recognized by the Jewish faith. This establishes only that the Attorney General was aware of the religious nature of the ceremony; there is no evidence that the religious nature of the ceremony prompted him to withdraw Shahar's offer of employment. As a result, both Shahar's free exercise claim and her expressive association claim fail for want of proof that religion bore a causal relationship to the Attorney General's decision.

In conclusion, I concur in the court's judgment for the reasons stated above.

GODBOLD, Senior Circuit Judge, dissenting in which BARKETT, Circuit Judge, and KRAVITCH, Senior Circuit Judge, join:

The court en banc has pretermitted decision of whether Shahar has constitutional rights of intimate association or expressive association. Instead it assumes that she enjoyed such rights and decides that these presumed rights have not been violated because the Attorney General acted reasonably

in "revoking [Shahar's] employment offer."[1]

I would grasp the nettle and hold that in the particular circumstances of this case Shahar enjoyed rights of intimate association and expressive association and that the Attorney General violated those rights because he did not act reasonably in revoking the agreement made with Shahar.[2]

Shahar does not assert a right to be married as provided by the laws of Georgia (statutory or common law), or to be issued a marriage license, or to inherit from her spouse, or to be entitled to social security benefits through her spouse. She does not question the constitutionality of the Georgia marriage license statute or any provisions of Georgia law that speak in terms of marriage as a ceremony, or as a status, between persons of different sexes. Nor does she question the validity of Georgia principles of common law marriages. As the panel of this Court held in its now-vacated opinion:

> What Shahar claims is that she proposed to -- and did -- engage in a Jewish religious ceremony that is recognized as a marriage ceremony by the branch of Judaism to which she adheres; that this conferred upon her and her partner a religious-based status that is apart from and independent of civil marriage as provided by Georgia law; and that she can

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[1] I assume it would make no difference in this Court's decision, but the Attorney General did not revoke an "employment offer." He had offered employment and the offer had been accepted, but the date on which work was to begin was left open. Before that date was fixed the Attorney General canceled the employment agreement.

[2] The district court and all three members of the panel agreed that Shahar enjoyed protected intimate association rights. The district court did not address expressive association.

> accept, describe, and hold out both the ceremonial event and the status created by it by using the term "marriage."

70 F.3d at 1222. In ¶1 of her amended complaint Shahar alleged that she was "fired" because of her participation "in a private religious ceremony of marriage." The rabbi performed a "Jewish marriage ceremony," ¶7, followed by "a weekend celebration of Jewish marriage," a "private religious marriage ceremony," ¶8. Plaintiff and her partner considered their "planned religious marriage" an important event, ¶9. In ¶10 Shahar disclaimed any claim of civil or legal marriage pursuant to law. That paragraph alleged:

> 10. Plaintiff does not believe and has at no time represented either that her religious union with her partner carries with it any legal rights or that it constitutes a legal (civil) marriage. The ceremony was of purely religious nature.

The religious and historical roots of the associational rights that Shahar defends were spelled out in the panel opinion. Because that opinion has now been vacated, they deserve to be repeated.

> The intimate association Shahar asserts is not based upon false or sham assertions of religious belief, or hasty decision, of overnight conversion. She and her partner grew up in traditional Jewish families. Shahar attended Hebrew school from the third grade. She was bat mitzvahed at age 13 and continued in Hebrew school until she was confirmed at age 16. Greenfield grew up in a conservative, kosher, Jewish home. She went through Jewish training through high school, attended Jewish summer camps, and was involved in Jewish youth groups.

Shahar and Greenfield have been significant participants in the life of their synagogue, located in Atlanta. It is affiliated with the Reconstructionist Movement, one of several movements within Judaism. The synagogue serves gays, lesbians, and heterosexuals. The Reconstructionist Movement is regarded as liberal in some respects but is conservative in others. Shahar has led services at the synagogue and has given several sermons. She and Greenfield often attend together. The proposed ceremony was announced at a service of the synagogue.

Their rabbi, Sharon Kleinbaum, counseled them in eight or nine formal premarital sessions and many informal ones. Rabbi Kleinbaum described the manner in which she satisfied herself of their commitment to the Jewish faith. She discussed with them "the seriousness of their commitment to the Jewish issues as well as to each other, and anything related to wedding ceremonies in general that, as a Rabbi, I would do." Dep. p.82. Continuing, she said, "I discussed with them the nature of their home life and the significance of Jewish practices to them and how it was inconceivable to them to do any kind of ceremony that was not a Jewish one." *Id.* at 83. Rabbi Kleinbaum considers that the union in which they joined is a public affirmation of their commitment to each other and to the Jewish people, having no legal significance but only personal and religious significance, and that it can be

terminated only by the church.

> The evidence demonstrates without dispute that same-sex marriage is accepted within the Reconstructionist Movement of Judaism, that Shahar and her partner are committed to that belief, and that, in keeping with their Jewish principles, they carefully and thoughtfully prepared for marriage.

70 F.3d at 1222-23.

The evidence discloses that Judaism in the United States does not have a monolithic view of same-sex marriages. The Reconstructionist Movement accepts the concept of same-sex marriage, and many rabbis within the Movement perform such marriages. The Reconstructionists are working on a manual that will help guide rabbis performing same-sex marriages. Other movements in Judaism reject same-sex marriages, and still other movements are divided in view, with some rabbis performing such marriages and others declining to do so. But the critical facts are that Shahar and her partner are lifelong adherents to Judaism and good-faith, dedicated participants in the Reconstructionist Movement; the Reconstructionist Movement is a significant movement within American Judaism; and it regards same-sex marriages as acceptable and desirable in preference to couples living together without marriage.

The actual ceremony between Shahar and Greenfield occurred after the Attorney General terminated the agreement with her, but it is relevant to the fact that her association has religious basis and status. It was the culmination of a weekend of religious-centered activities that began Friday evening with a celebration of the Hebrew Sabbath, which extends from Friday evening to Saturday evening. The wedding occurred on Sunday. Essentially the ceremony followed the traditional ceremony for a heterosexual Jewish

couple except for deletion of terms "bride" and "groom." It took place beneath the traditional canopy. The couple signed the traditional Kutubah, or written marriage contract. They exchanged rings in traditional fashion, and the traditional glass was broken. The traditional seven blessings were given, done in Hebrew and in English. Rabbi Kleinbaum was dressed in traditional garb. She described the event as a "Jewish religious ceremony," as a "Jewish marriage," and as a "Jewish wedding."

In her testimony Rabbi Kleinbaum explained the importance of the family to the survival of the Jewish people and the significance of the Jewish marriage ceremony to the creation of the family unit. Therefore, as she explained, the commitments made by Shahar and her partner through the marriage ceremony were not only commitments to each other but to their congregation and to all of the Jewish people as well.

The Attorney General did not act reasonably. One must focus on what he knew and what he did. Post-event rationalizations of what he might have done, thought up afterwards in ivory towers, will not do. Two statements are central, the termination letter and the Attorney General's statement of position made to the panel of this court. The termination letter said in part:

> This action has become necessary in light of information which has only recently come to my attention relating to a purported marriage between you and another woman. As the chief legal officer of this state inaction on my part would constitute tacit approval of this purported marriage and jeopardize the proper function of this office.

70 F.3d at 1221. The Attorney General's position before the panel was expressed in a significant three-prong state-

ment:

> The Attorney General did not withdraw Shahar's offer of employment because of her association, religious or otherwise, with other homosexuals or her female partner, but rather because she invoked the civil and legal significance of being "married" to another woman. Shahar is still free to associate with her female partner, as well as other homosexuals, for religious and other purposes.

Id. at 1224, quoting from the Attorney General's brief. Examine the three prongs. They are: (1) Shahar's employment was not withdrawn for her association with her partner; (2) It was withdrawn because she invoked the civil and legal status of being married to another woman; (3) She is free to associate with her partner for religious reasons.

As to (1), the undisputed evidence is that in fact the Attorney General *did* terminate Shahar because of her religious-based association with her partner. As I explain below, he feared that he *might be* infringing on Shahar's religious beliefs, but he failed to make reasonable inquiry to determine if he was. As to (3), plainly Shahar was not free to associate with her partner for religious purposes. That is exactly what she had done, and it cost her her employment agreement.

The prong that requires discussion is (2). The termination letter is plainly based on the Attorney General's conclusion that Shahar was falsely holding herself out as becoming married in the civil and legal sense, i.e., proposing to engage in a "purported marriage." In search of evidence of holding out by Shahar this court relies upon her use of the words "marriage" and "wedding." This implicates differing perceptions of what words mean. In a common law/statutory/traditional sense "marriage" describes a ceremony as a re-

lationship or status between two persons as defined by common law or statute, involving two heterosexual persons, one male and one female. But, as this case tells us, that is not the only and ineluctable meaning. To a person of Shaher's faith as a Reconstructionist Jew "marriage" refers to the formal Jewish wedding ceremony recommended and carried out pursuant to the participants' Jewish faith by two persons (including two homosexuals) who have made a lifelong commitment to each other and are bound to each other by the ceremony in a relationship that can be terminated only within their faith and who, by engaging in the ceremony, made a commitment to the Jewish people as well. "Marriage" also refers to the status thereby conveyed upon them. In the eyes of Shahar and her partner they engaged in a Jewish marriage and they are accepted by their faith as married and accordingly they may use the term "marriage" to refer to the ceremonial event and to the status created by it.

This court, in its footnote 1, recognizes the duality of meaning that I have described for "wedding" and "marriage" [and "spouse"]. Throughout its opinion the court attempts to indicate (not always successfully) by quotation marks and limiting words which meaning it is referring to. But the decision of the en banc court is based upon, and approves, the Attorney General's attribution to these words of only a single meaning, the statutory/common-law/traditional meaning, and his perception that any other meaning is either false or non-existent, i.e., Shahar proposed to engage in a "purported marriage." The court simply adopts one perception and excludes the other as though it did not exist for Shahar and for others of her faith.

What the Attorney General knew was that Shahar had used the terms "marriage" and "spouse" and "marriage ceremony" in referring to the ceremony she planned and to the status to be created by it. She had used the terms "honeymoon" or "wedding trip" in describing her plans. Within

the office there was information that she planned to send, or had sent, invitations to the ceremony and that some staff members were on the invitation list, and other information that, as the Attorney General described it, the planned ceremony would be "a big or church wedding, I don't remember which." Possessed of some, or all, of this knowledge, the Attorney General neither saw Shahar nor talked to her but built a Chinese wall around himself and concluded that she had falsely invoked the civil/statutory/common-law meaning that he attributed to the terms. We know that it occurred to him that assigning a single meaning to "marriage" and "wedding ceremony" might not be correct, for he talked with a female Jewish member of his staff, who told him that the wedding was to be performed by a rabbi from New York who performed homosexual marriages but that "she was not aware of homosexual marriages or gay and lesbian marriages being recognized in Judaism." At best the response was ambiguous -- on the one hand the wedding was to be done by a rabbi, but on the other hand the staff member was not aware that it would be recognized in Judaism. As it turned out, she was correct about the rabbi but incorrect or uninformed about recognition of the marriage.

Since the Attorney General neither saw nor talked with Shahar the decision by this court relies upon information supplied to him by senior staffers who had talked with him. The Attorney General was out of town when the matter first came up. Senior staffers met together several times and discussed their concerns and possible action. The group considered, but rejected, a suggestion that there be a meeting with Shahar to discuss the matter. After the Attorney General returned he met with staffers. He reached the conclusion that the job offer should be withdrawn. In a meeting with staffers the structure of a "termination meeting" with Shahar was worked out. The Attorney General would not be present at the meeting. A designated staffer (accompanied by a witness) was to meet with Shahar, tell her that the

offer to her was withdrawn, and deliver to her the termination letter (in sealed form). The messenger was instructed to make no additional comments and to tell Shahar if she had comments they should be addressed to the Attorney General in writing. The staff member-spokesman prepared a written script of what he would say. Ironically, it concluded: "Thanks again for coming in and have a nice day." The scenario was played out. Shahar asked to see the Attorney General and was told that he was unavailable.

The Attorney General and his staff acted in ignorance of the religious roots of the association that Shahar planned, the centrality of it to her faith, and the recognition of it by the religion to which she was committed. Staff members could recall no discussion of or inquiry into the religious aspects of the matter. The actions by the Attorney General do not meet the constitutional requirements of reasonableness.[3]

If the Attorney General had made reasonable investiga-

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[3] This court also suggests that Shahar held herself out as "married" in the statutory/common-law/traditional sense because she and her partner were granted (presumably on a homeowners or auto insurance policy) an insurance rate available to married women. But the undisputed evidence is that Shahar talked to her insurance agent, explained the relationship between her and her partner, and asked if the rate was available to them. The insurance company afforded them that rate. This was no false "holding out," no pretext of marriage in the legal sense. Indeed, it was the contrary. Shahar told the agent the facts of her relationship. If this incident tends to prove anything it is that the insurance company, possessed of facts, recognized and accepted the duality of meaning of "marriage" and for its purposes accepted that Shahar was a married woman.

This court also refers to joint ownership of a home as "holding out." Under Georgia law joint ownership does not require marital status. O.C.G.A. §§44-6-120 and 44-6-190.

It is unclear when the insurance matter occurred. Joint ownership of the house existed before this case arose. It is clear that the Attorney General did not rely on either of these factors or even knew of them.

tion this case might never have arisen. But not only did he make no further investigation, he closed the door to knowledge. It would have been easy to confer with Shahar, or have an assistant do so, and explore her desire to use the term "marriage" and his concern about this usage. If she had then explained that she used the term as recommended and accepted by her faith, the Attorney General, correctly enlightened, might have been satisfied. On the other hand, he might have rejected her explanation as insufficient to ameliorate his concerns. He might have explained to her his fear of possible impact on his office and could have explored with her ways in which she might disseminate knowledge of the religious nature of her intimate association. What we do know is that neither the Attorney General, nor the staff members on whom this court implies that he relied, made inquiry into the religious nature of her plans beyond the ambiguous or mistaken response from the single Jewish staff member of whom the Attorney General inquired. The Attorney General walled himself off, forbade comment or inquiry by staff members who met with Shahar, and terminated the agreement with Shahar on his erroneous perception of the association that she was asserting. Whatever his views about possible adverse effects on his office, he did not act reasonably.

Respectfully, I dissent.

KRAVITCH, Senior Circuit Judge, dissenting, in which BARKETT, Circuit Judge, GODBOLD, Senior Circuit Judge, join:

I adhere to the view, previously expressed in my opinion in the now-vacated panel decision of this case, that the district court: (1) correctly recognized that Shahar's relationship with her partner qualifies as a protected intimate association under the First Amendment; and (2) erroneously concluded that, on the record of this case, Bowers' legiti-

mate interests as a public employer outweighed Shahar's constitutionally recognized, associational interests. Accordingly, I dissent from the en banc court's affirmance of the district court's grant of summary judgment to Bowers.

I begin by noting what this case does not concern. It does not involve a claim that homosexuals have a constitutional right to marry in the civil or legal sense. Shahar used words, such as "marriage" and "wedding", in a generic, not a legalistic, sense when she described her relationship with her partner.[1] Due to her religious beliefs, these words also took on a spiritual character for Shahar, but she never contested her ineligibility for the legal benefits of a civil marriage under Georgia law. As a result, the court is not called, as the en banc majority implies in Footnote 2 of its opinion, to engage the "constitutional controversy" over the "institution of marriage."[2]

The first issue properly before the court is whether Shahar's relationship with her partner qualifies as an intimate association under the Constitution. The Supreme Court has held "that the First Amendment protects those relationships, including family relationships, that presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares a special communi-

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[1] Such generic meanings are an established part of the English language. *Webster's New Collegiate Dictionary* (1979) at 698 (giving "an intimate or close union" as one definition of marriage), 1318 (noting that wedding is defined, *inter alia*, as "an act, process, or instance of joining in close association").

[2] Certainly, it would have been more prudent for Shahar to have consistently used terms, such as "commitment ceremony" and "partnership", to refer to her relationship. Shahar's use of language, however, does not transform this case into a debate over traditional marriage, particularly given that she only used the controversial terms with members of Bowers' staff in two conversations and on one conflict of interest form.

ty of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.'" *Bd. of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 545, 107 S.Ct. 1940, 1946, 95 L.Ed.2d 474 (1987)(quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 619-20, 104 S.Ct. 3244, 3250 -51, 82 L.Ed.2d 462 (1984)). This court has applied the intimate association doctrine expansively to cover not only well-established familial bonds, but also dating couples. *See Wilson v. Taylor*, 733 F.2d 1539 (11th Cir. 1984)(ruling that non-marital relationship between police officer and daughter of reputed, organized crime figure is protected intimate association). Shahar's relationship with her partner satisfies the Supreme Court's definition of an intimate association in that it is characterized by "relative smallness, a high degree of selectivity in decisions to begin and maintain an affiliation, and seclusion from others in critical aspects of the relationship." *Roberts*, 468 U.S. at 620, 104 S.Ct. at 3250. In light of this court's ruling in Wilson and the Supreme Court's ruling in *Roberts*, I conclude that Shahar's relationship with her partner qualifies as a protected intimate association under the First Amendment.[3]

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[3] Bowers apparently recognizes that Shahar's relationship with her partner meets the objective characteristics of an intimate association outlined in *Roberts* and its progeny, and therefore, he contends a further requirement applies, namely that the relationship in question must fall within the category of associations traditionally endorsed by society at large. In support of this argument, Bowers cites *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), a case in which the Supreme Court upheld the constitutionality of a local licensing ordinance for motels that rented rooms for periods of less than 10 hours. In so ruling, the Court observed that associations "formed from the use of a motel room for fewer than 10 hours are not those that have 'played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs.'" *Id.* at 237, 110 S.Ct. at 611. In my view, the foregoing statement stands for the proposition that superfi-

(continued...)

I agree with the en banc majority that the right of intimate association is not absolute, and that in the public employment context adverse actions which implicate intimate associational interests should be reviewed pursuant to the balancing test first enunciated in *Pickering v. Bd. of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). *See Stough v. Gallagher*, 967 F.2d 1523, 1527 (11th Cir. 1992) (ruling that under *Pickering* "courts must balance the [protected First Amendment] interests of the public employees as citizens . . . and the interest of the 'State as an employer, in promoting the efficiency of the public services it performs through its employees'" (quoting *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734-35)). In my view, however, the en banc majority has employed a balancing test in name only.[4] The en banc majority's opinion devotes paragraph after paragraph to Bowers' interests, but gives short shrift to Shahar's intimate associational interests. In contrast, Judge

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[3] (...continued)
cial relationships fail to qualify as intimate associations under the Constitution, not for the proposition that courts should deny recognition to deep-seated relationships which are, or have been, unpopular. Because Shahar's relationship with her partner unquestionably constitutes a close, ongoing interpersonal association, not an hours-long encounter, *FW/PBS* does not undermine her claim for constitutional protection.

[4] The en banc majority properly recognizes that as the chief law enforcement officer in Georgia, Bowers' legitimate concerns for the functioning of his staff carry special weight in the *Pickering* balance. I believe, however, that the en banc majority goes further, and inappropriately grants virtually absolute deference to Bowers, without weighing the countervailing interests on which he impinges. Such an approach categorically exempts Bowers' employment decisions from scrutiny, and therefore, is inconsistent with well-established authority mandating particularized decision-making in this context. *See, e.g., Bates v. Hunt*, 3 F.3d 374, 378 (11th Cir. 1993)("[W]hether a governmental employer has improperly infringed on an employee's First Amendment rights turns on the specific facts of the particular case: a 'case-by-case' analysis is required.").

Godbold's dissenting opinion eloquently relates the sincerity and depth of feeling which underlies Shahar's connection to her partner. Because the association in question falls close to the familial end of the continuum of human relationships, I conclude that Shahar's interests weigh heavily in the *Pickering* balance. *See Roberts*, 468 U.S. at 620, 104 S.Ct. at 3250-51 (contrasting family ties with large business enterprises in observing that various associational bonds support "greater and lesser claims to constitutional protection").

On the other side of the balance, the en banc majority first considers Bowers' interests in the internal workings of his office. Bowers has not asserted that Shahar's association caused any actual disruption of the functioning of his staff. Instead, Bowers has forecast that Shahar's presence will undermine morale and create divisions within the Georgia Department of Law because some employees will view her association as a political statement inconsistent with state laws that the Department must enforce. The en banc majority correctly notes that courts must give "substantial weight to government employers' reasonable predictions of disruption . . . ." *Waters v. Churchill*, 511 U.S. 661, 673, 114 S.Ct. 1878, 1887, 128 L.Ed.2d 686 (1994). The Supreme Court, however, has rejected the notion that courts must accept blindly all claims of harm conjured by government employers:

> On the other hand, we do not believe that the court must apply the [balancing] test only to the facts as the employer thought them to be, without considering the reasonableness of the employer's conclusions. Even in situations where courts have recognized the special expertise and special needs of certain decisionmakers, the deference to their conclusions has never been complete . . . . We think employer decisionmaking will not be unduly burdened by

> having courts look to the facts as the employer *reasonably* found them to be. It may be unreasonable, for example, for the employer to come to a conclusion based on no evidence at all. Likewise, it may be unreasonable for an employer to act based on extremely weak evidence when strong evidence is clearly available -- if, for instance, an employee is accused of writing an improper letter to the editor, and instead of just reading the letter, the employer decides what it said based on unreliable hearsay.

Id. at 677, 114 S.Ct. at 1889 (emphasis in original).

To the extent Bowers concluded Shahar would disrupt the office because her relationship could be interpreted as a political statement, he did not act reasonably. Shahar's association with her partner, although not secret, was private. Shahar's religious marriage ceremony was by invitation and was held in another state. It was neither announced in the newspapers, nor otherwise reported publicly.[5] Further, Shahar never claimed she had contracted a legal marriage, nor did she challenge her legal ineligibility for civil marriage. Bowers could and should have ascertained all of these facts before he took action against Shahar. Instead, as Judge Godbold notes in his dissent, Bowers categorically refused to discuss his purported concerns with Shahar. Finally, the record confirms that Bowers had no factual basis to believe Shahar had violated the law or advocated violations of law.[6]

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[5] The fact that Shahar did not publicize her relationship similarly undercuts Bowers' claim that Shahar showed poor judgment.

[6] In fact, Bowers testified that he "didn't know whether [Shahar] violated the law or not," Bowers Dep. at 67, and that he didn't "know the nature of the sexual relation[s between Shahar and her partner], if any," *id.* at 69.

Because Bowers failed to act reasonably, under *Waters*, his predictions regarding intra-office strife do not weigh very heavily in the balance.

Bowers' other main justification for his action centers around his fear of negative public reaction to his hiring of Shahar. Although public confidence certainly is a relevant concern for Bowers, it is important to note that catering to private prejudice is not a legitimate government interest. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448, 105 S.Ct. 3249, 3258-59, 87 L.Ed.2d 313 (1985); *Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S.Ct. 1879, 1882, 80 L.Ed.2d 421 (1984). The en banc majority attempts to justify its emphasis on anticipated public hostility by pointing to *McMullen v. Carson*, 754 F.2d 936 (11th Cir. 1985), a case in which this court considered public reaction to the presence of a Ku Klux Klan recruiter in a sheriff's office in affirming a governmental employment decision. *McMullen*, however, bears no relationship to this case.

First, unlike *McMullen*, where the employee publicized his association with the Klan on a television news broadcast, in this case, Shahar did not make any public statements. Further, the sheriff's decision in *McMullen* was not simply based on his prediction that the public would be biased against the Klan-affiliated employee. Rather, the record established that "violent racism has become the Klan's trademark . . . [that] [d]ivisive, confrontational tactics are used by the Klan during periods of racial unrest in order to promote recruitment [and that] [t]hose tactics are still being used in Florida." *McMullen*, 754 F.2d at 938 (emphasis added). The sheriff and the community thus reasonably could conclude that the Klan recruiter sanctioned such inflammatory, often illegal, activities. In contrast, Bowers simply baldly asserted that public reaction to Shahar's pending employment with his office would have prevented him from serving the state effectively. In light of the

Klan's undisputed history of criminal violence, public reaction in *McMullen* was not only more certain, but also likely would have been more severe than anything which reasonably might have been projected in this case. Finally, although public concern over the Klan's criminally violent activities is a legitimate basis for governmental action, the Supreme Court has now held that animosity toward gay people is an illegitimate purpose for state policy, and thus, to prevail in the balancing of interests, Bowers must cite more than perceived, public distaste for homosexuals. *See generally Romer v. Evans*, ___ U.S. ___, ___, 116 S.Ct. 1620, 1629, 134 L.Ed.2d 855 (1996).

The foregoing analysis leads me to conclude that, on the record of this case, Shahar's constitutional interest in pursuing her intimate association with her partner outweighs any threat to the operation of the Georgia Department of Law. Accordingly, I would reverse the district court's order granting summary judgment against Shahar.[7] For these reasons, I respectfully dissent.

BIRCH, Circuit Judge, dissenting, in which BARKETT, Circuit Judge, GODBOLD and KRAVITCH, Senior Circuit Judges, joined:

I respectfully dissent. Shahar's relationship with her partner qualifies as a protected intimate association under the First Amendment for the reasons set out in Judge Kravitch's dissent, page 1123. I agree with both the majority and dissent that, in a government employment context, the *Pickering* balancing test is the appropriate test for reviewing official action which implicates First Amendment intimate associational rights. *See Pickering v. Board of Educ.*, 391

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[7] Because I conclude Shahar's other claims would not warrant relief beyond that to which Shahar would be entitled pursuant to her intimate association claim, I do not address any other issues raised in this appeal.

U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). I might have found the majority's application of the *Pickering* balancing test more convincing were it not for the Supreme Court's recent decision in *Romer v. Evans*, ___ U.S. ___, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). In my opinion, the Court's recognition in *Romer* that homosexuals, as a class, are entitled to some protection under the Equal Protection Clause bears on the validity -- and therefore the weight in applying the *Pickering* balancing test -- of Bowers' justifications for his action. With *Romer* in the balance, the scales tip decidedly in favor of Shahar because Bowers' asserted interests are not a legitimate basis for infringing Shahar's constitutionally-protected right of intimate association. For this reason, I dissent from the en banc court's affirmance of the district court's order granting summary judgment to Bowers.

In *Romer*, the Supreme Court held that a Colorado constitutional amendment which discriminates against homosexuals does not pass constitutional muster. *Romer*, ___ U.S. at 116 S.Ct. at 1627. The Court did not decide the issue of whether homosexuals constitute a suspect class because the Colorado law which was at issue in *Romer* failed even under the rational basis inquiry. *See id.* at ___, 116 S.Ct. at 1627. The import of *Romer*, however, is to elucidate what the Supreme Court considers not to be a rational basis for discrimination against homosexuals.[1] The state argued that the rationale for the law included "respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objec-

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[1] Although the discriminatory conduct that occurred in *Romer* arose in a different factual context than this case, I disagree with the majority's attempt to distinguish *Romer* to the extent that it finds it to be wholly irrelevant. The reasoning and principles enunciated in Romer are, in my view, highly relevant to this case and provide a directive that, at least, should inform our analysis.

tions to homosexuality." *Id.* at ___, 116 S.Ct. at 1629. Over a vigorous dissent by Justice Scalia, a six-justice majority of the Court rejected the state's rationale, declaring that "animosity toward the class" of homosexuals is not a legitimate basis for state action. *Id.* at ___, 116 S.Ct. at 1628; *see id.* at ____, 116 S.Ct. at 1629 (Scalia, J., dissenting)("In holding that homosexuality cannot be singled out for disfavorable treatment, the Court . . . places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias."). I am compelled to conclude that the Court's pronouncement in *Romer* must inform our consideration of Shahar's intimate association claim.

The *Pickering* balance in this case requires us to measure Shahar's right of intimate association against Bowers' asserted interests in infringing that right in the context of an employment relationship. The weight we accord to Bowers' asserted interests, however, hinges entirely on the reasonableness of his predictions as to how Shahar's homosexual relationship might affect or disrupt the Attorney General's office, *see Waters v. Churchill*, 511 U.S. 661, 677-78, 114 S.Ct. 1878, 1889, 128 L.Ed.2d 686 (1994); significantly, it is undisputed that Bowers has made no showing of actual disruption to the office. When we closely examine these predictions, we discover that each one is based on a series of assumptions and unsupported inferences about Shahar *because of her status as a homosexual*.[2] I cannot agree

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[2] The distinction that the majority draws between Shahar's status as a homosexual and her conduct in entering into a homosexual marriage, *see* Majority op. at 1111 n. 27, is truly a distinction without a difference, in my opinion. It is a matter of simple logic that only *homosexuals* would enter into a *homosexual* marriage. Bowers' action, therefore, draws a distinction that, on its face, reaches homosexuals only and distinguishes among similarly situated people on the basis of one trait only: that they (continued...)

[2] (...continued)
are homosexual.

Bowers cannot escape this conclusion by subdividing the class of homosexuals into those who elect to enter into a homosexual marriage and those who do not, and then claiming that he discriminated against Shahar not because of her status as a homosexual, but because she is a homosexual and she entered into a homosexual marriage. The Supreme Court's decision in *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) is instructive on this point. In *Loving*, the Supreme Court struck down as unconstitutional Virginia's anti-miscegenation statute. As the state of Virginia argued, that statute was not directed at a specific race. *Id.* at 7-8, 87 S.Ct. at 1821. Yet, the Supreme Court concluded in *Loving* that the statute did invoke a racial classification, *id.* at 8-9, 87 S.Ct. at 1822, notwithstanding the fact that it applied only to blacks and whites who engaged in the "conduct," *Majority op.* at 1111 n.27, of marrying a person from another race. *This case is no less about classification on the basis of sexual orientation than* Loving *was about classification on the basis of race.* According to the manifest logic of *Loving*, therefore, Bowers' action drew a classification along lines of sexual orientation. With the advent of *Romer*, such a classification has a significant effect on the *Pickering* balancing equation.

In his special concurrence, Judge Tjoflat agrees with the majority that the record does not support an inference that Bowers' decision was based on Shahar's homosexual status. Considering the fact that the briefs as well as all the opinions in this case are riddled with references to Shahar's homosexual status and the reasonableness -- or non-reasonableness -- of Bowers' inferences from that status, I find it difficult to understand how we can seriously contend that an inference of discrimination on the basis of homosexual status cannot be made. The special concurrence attempts to avoid the equal protection dimension of this case by using a cramped view of causation. *See ante* at 1116 ("A reasonable trier of fact could find from the record in this case that the Attorney General's decision was motivated not by the fact that Shahar is a homosexual, but because she and her partner were maintaining an open homosexual relationship."). It is easy to appreciate this by imagining, as the special concurrence suggests, *see ante* at 1116, that Shahar had been dismissed because she was a white woman that married a black man,

(continued...)

with the majority that these inferences and assumptions constitute a legitimate state interest to discriminate against Shahar in light of the Supreme Court's teaching just last term that mere "animosity toward the class" of homosexuals is not a rational basis for state action. *Romer*, ___ U.S. at ___, 116 S.Ct. at 1628.

The first inference that Bowers drew from Shahar's status as a lesbian who married[3] another woman is that the public might be hostile to her participation in a same-sex marriage and might view Shahar's employment by his Department as inconsistent with Georgia law. Bowers argued

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[2] (...continued)
and replacing references to homosexuality by references to race in both the majority and concurring opinions. For example, the footnote which accompanies the above quoted text from the special concurrence, *see ante* at 1116 n.9, would have stated: "A reasonable trier of fact could also find that the Attorney General withdrew Shahar's offer because he could not trust her; during a telephone conversation in June 1991, Shahar misled Deputy Attorney General J. Robert Coleman into believing that she was going to marry a [white] male. A reasonable trier of fact could also or alternatively find that the Attorney General, as he explained to the Dean of the Emory Law School in a letter contained in the record of this case below, withdrew the offer because he thought that Shahar had set him up and planned to use him to advance a [racial-equality] agenda." A clearer violation of the Equal Protection Clause hardly could have been presented.

[3] In connection with Shahar's relationship with her partner, I am using the words "married" or "marriage" in their generic sense of a committed, intimate union. It may be important to note that at no time has Shahar violated Georgia law by entering into a homosexual marriage. A Georgia law that was enacted in 1996, almost five years after Shahar was dismissed by Bowers, declares that Georgia does not recognize same-sex marriages. *See* O.C.G.A. §19-3-3.1 (Supp.1996); *see also* O.C.G.A. §19-3-30(b)(1)(Supp.1996)("No marriage license shall be issued to persons of the same sex."). Shahar has not sought to obtain a marriage certificate or to have her marriage legally recognized by the state of Georgia.

in his brief that "the public perception is that 'the natural consequence of a marriage is some sort of sexual conduct, . . . and if it's homosexual, it would have to be sodomy.' " Appellee's Panel Brief at 10-11 (quoting Bowers Dep. at 80-81).[4] As the Supreme Court made clear in *Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984), the government may not transform private biases into legitimate state interests by relying on the prejudices of the public.

> Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private . . . prejudice that they assume to be both widely and deeply held."

Id. at 433, 104 S.Ct. at 1882 (quoting *Palmer v. Thompson*, 403 U.S. 217, 260-61, 91 S.Ct. 1940, 1962-63, 29 L.Ed.2d 438 (1971)(White, J., dissenting)); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448, 105 S.Ct. 3249, 3258-59, 87 L.Ed.2d 313 (1985)(applying the principle of *Palmore* to government action reviewed under the rational basis test).

In applying the principle of *Palmore* to this case, the key question is not whether the government official reasona-

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[4] In the face of Shahar's evidence of statistical studies showing that lesbians prefer to engage in non-sodomy sexual practices, rather than anal or oral sex -- the only two practices prohibited by Georgia's sodomy statute -- Bowers argues that the public is not aware of these statistics and that, therefore, the public's erroneous assumptions about lesbians take precedence. Erroneous assumptions about a person, however, are not a rational basis for discriminating against that person, even if these erroneous assumptions are wide- spread and are religiously based. *See Romer*, ___ U.S. at ___, 116 S.Ct. at 1629.

bly could assume that the public might have a negative reaction to the employee's presence; it is whether the public's perception upon which the official relies is itself a legitimate basis for government action. If the public's perception is borne of no more than unsupported assumptions and stereotypes, it is irrational and cannot serve as the basis of legitimate government action.[5] In this instance, the public's (alleged) blanket assumption that "if it's homosexual, it would have to be sodomy" is based not on anything set forth in the record but rather on public stereotyping and animosity toward homosexuals. Under the principles articulated in *Romer*, this does not provide the state with a legitimate, rational basis to discriminate against Shahar. Bowers' "concern" for the public's perception of homosexuals, therefore, is entitled to no weight in balancing Shahar's right of intimate association.

Bowers also asserts an interest in dismissing Shahar under the broad rubric of concern for the internal workings of his office. Bowers advances two main arguments in support of this interest: (1) Shahar's conduct might undermine the "morale" of the office because some employees might view her conduct as a political statement inconsistent with Georgia's laws criminalizing sodomy and denying public benefits to couples engaged in same-sex marriages; and (2) as Attorney General, Bowers is justified in assuming not only that Shahar would violate Georgia law by committing sodomy but, moreover, that she necessarily would have a

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[5] For this reason, the majority's citation to *McMullen v. Carson*, 754 F.2d 936 (11th Cir. 1985), in which a state official relied on anticipated public reaction as a basis for dismissing a Klu Klux Klan recruiter from a sheriff's office, is misplaced. In light of the Klan's undisputed history of criminal violence against minorities in this country, I can hardly imagine anyone would argue that the public's assumption that membership in the Klan is antithetical to the work of an employee of a law enforcement agency is irrational.

conflict of interest with respect to certain types of controversial cases involving sodomy or benefits for same-sex partners.

Bowers' argument with respect to the alleged deleterious effect of Shahar's status and conduct on "morale" within the office is another attempt to legitimize his adverse action against Shahar on the basis of inferences that others -- here, his employees -- might derive from her status as a lesbian. The inferences from Shahar's acknowledged homosexuality that she is likely to violate Georgia's sodomy law, or would be unable or unwilling to enforce Georgia's sodomy or marriage laws, is no more justified on behalf of Bowers or his employees than it is on behalf of the public. Moreover, it is important to note that Bowers' speculation regarding Shahar's ability to handle certain types of cases is just that: speculation. Bowers has emphatically refused to meet with Shahar to discuss any of his concerns. Compounding this deficiency in Bowers' assertion that his prediction is "reasonable" is the fact that Bowers does not make the same assumption with respect to any of his other employees: He does not assume, for instance, that an unmarried employee who is openly dating an individual of the opposite sex has likely committed fornication,[6] a criminal offense in Georgia, and thus may have a potential conflict in enforcing the fornication law. Nor, for that matter, does he apparently assume that married employees could well have committed sodomy -- i.e., oral or anal sex, *see* O.C.G.A. §16-6-2 -- and could themselves have a potential conflict in enforcing

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[6] In Georgia, "[a]n unmarried person commits the offense of fornication when he voluntarily has sexual intercourse with another person." O.C.G.A. §16-6-18. I trust that no one would find unreasonable, in the colloquial sense of the word, the assumption that Georgia's fornication law is frequently disregarded by the citizenry of Georgia or perhaps even the unmarried staff of its Department of Law.

Georgia's sodomy law.[7]

In short, Bowers' asserted interests in taking adverse action against Shahar are based on inferences from her status as a homosexual which Bowers claims that he, the public, and department staff are entitled to make. In light of the Supreme Court's decision in *Romer*, these status-based inferences, unsupported by any facts in the record and explained only by animosity toward and stereotyping of homosexuals, do not constitute a legitimate interest that outweighs Shahar's First Amendment right of intimate association. Accordingly, I would reverse the district court's order granting summary judgment to Bowers.

BARKETT, Circuit Judge, dissenting, in which GODBOLD and KRAVITCH, Senior Circuit Judges, join:

The majority opinion does not meet the constitutionally required process for determining when the government as employer may curtail a public employee's First Amendment rights. It departs not only from Supreme Court precedent establishing that process, but from this circuit's precedent in applying the process to analogous factual contexts.

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[7] In the context of a habeas petition by a married heterosexual convicted of sodomy, *Moseley v. Esposito*, No. 89- 6897-1 (Super.Ct. DeKalb Co.), Bowers' Department of Law moved to strike the petitioner's motion to discover whether any of Bowers' attorneys had themselves ever violated the sodomy law because "[t]he personal conduct [of Department attorneys] is no more relevant than the personal conduct of Petitioner's counsel or the Court." R2-35-Exh. B at 2 (Brief in Support of Motion to Strike and Expunge in Moseley); *see also id.* at 3-4 ("The information [Moseley] seeks has nothing to do with professional impropriety, but rather is wholly irrelevant . . . ."). Bowers has no reason for believing that Shahar's personal conduct would affect her abilities to ethically represent the state, except based on an impermissible inference from her status as a homosexual. Lawyers are trained to be advocates of legal positions with which they may personally disagree.

Since *Pickering*, the Supreme Court and several circuits (including this one) have applied its principles in several First Amendment contexts, including privacy,[1] free exercise of religion,[2] and freedom of association.[3] These cases make clear that while the balancing test is easier for the government to satisfy than the strict scrutiny standard used in the nonemployment context, it still affords significant protection from unwarranted government intrusion into an employee's First Amendment interests.

As Judge Godbold and Judge Kravitch so clearly demonstrate, notwithstanding its references to the *Pickering* test, the majority simply fails to apply the test in the instant case. Instead, the majority permits a government employer to support termination decisions predicated on the employee's exercise of First Amendment rights with only a minimal and totally subjective rationale and without considering the rights of the employee in the balance. In effect, the majority grants overwhelming, if not complete, deference to the Attorney General's subjective views. *See* Majority Op. at 1106 ("Whatever our individual, personal estimates might be, we . . . cannot say that the Attorney General's worries and view of the circumstances that led him to take the adverse personnel action against Shahar are beyond the broad range of reasonable assessments of the facts."); Majority Op. at 1109 ("We must defer to Georgia Attorney General's judgment about what Georgians might perceive unless his judgment is definitely outside of the broad range of reason-

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[1] *See Fyfe v. Curlee*, 902 F.2d 401 (5th Cir.), *cert. denied*, 498 U.S. 940, 111 S.Ct. 346, 112 L.Ed.2d 310 (1990).

[2] *See Brown v. Polk County*, 61 F.3d 650, 658 (8th Cir. 1995)(en banc).

[3] *See Gregorich v. Lund*, 54 F.3d 410, 414 & n. 4 (7th Cir. 1995); *Boddie v. City of Columbus, Miss.*, 989 F.2d 745, 748 (5th Cir. 1993); *Hatcher v. Board of Pub. Educ. & Orphanage*, 809 F.2d 1546, 1559 (11th Cir. 1987).

able views.").

The only purported support offered by the majority for its wholesale restructuring of *Pickering* appears to be its reading of the plurality opinion in *Waters v. Churchill*, 511 U.S. 661, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994). However, the sole issue in *Waters* was "whether the *Connick* test should be applied to what the government employer *thought* was said, or to what the trier of fact ultimately determines to have been said." *Id.* at 667-68, 114 S.Ct. at 1892 (emphasis added). Thus it simply addressed the method for resolving factual disputes as to whether the affected employee engaged in protected conduct.[4] Indeed, the Court's reasoning in *Waters* supports Shahar's position. The Court held that the facts as found by the employer after "*objectively reasonable investigation*" should establish whether the conduct (in that case, speech) was constitutionally protected. *Id.* at 683-84, 114 S.Ct. at 1892 (Souter, J., concurring, summarizing plurality opinion)(emphasis added). *Waters* asserts *Pickering*'s principles and reiterates the necessity for constitutionally enforced processes to protect the rights of government employees.

The *Pickering* test necessitates a careful, fact-intensive, structured inquiry to "balance the interests of the public em-

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[4] In answering that question, the *Waters* plurality made two observations that the majority overlooks. First, the plurality stated that it did not believe that balancing must be applied only to the facts as the employer perceived them, without considering the reasonableness of the employer's conclusions. *Id.* at 1889. According to the plurality, "even in situations where courts have recognized the special expertise and special needs of certain decision makers, the deference to their conclusions has never been complete." *Id.* Second, the plurality stated that "it may be unreasonable, for example, for the employer to come to a conclusion based on no evidence at all . . . [and] likewise, it may be unreasonable for an employer to act based on extremely weak evidence when strong evidence is clearly available." *Id.*

ployees, as citizens" in engaging in expression, "and the interest of the State as an employer, in promoting the efficiency of the public services it performs through its employees." *Stough v. Gallagher*, 967 F.2d 1523, 1527 (11th Cir. 1992) (internal quotations omitted). In granting overwhelming deference to an employer's subjective decision to terminate, the majority ignores a well developed body of circuit precedent that applies the *Pickering* balancing test in analogous law enforcement contexts and establishes a workable balance between the employee's exercise of First Amendment rights and measured deference to law enforcement officials. *See Stough*, 967 F.2d at 1523; *McCabe v. Sharrett*, 12 F.3d 1558 (11th Cir. 1994); *Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982); *McMullen v. Carson*, 754 F.2d 936 (11th Cir. 1985).

Stough involved a §1983 suit where a newly elected sheriff was sued after demoting a police officer who had campaigned for another candidate. On appeal, in balancing the competing interests, the court noted that the officer had engaged in political speech which deserves "special protection" from the First Amendment, that the officer had spoken during his off-duty hours, and that the expressions were not rude or insulting. *Stough*, 967 F.2d at 1529. The court also noted the absence of *actual evidence* that the expression adversely affected the sheriff's work environment, and the fact that the sheriff had previously indicated that personal loyalty was not a prerequisite for the affected officer's job. *Id.* at 1529.

In *McCabe*, the issue was whether a police chief could permissibly transfer a personal secretary who married a lower-level police officer. The court indicated that, under *Pickering*, "the employer's interest will weigh more heavily in the *Pickering* balance the more closely the challenged employment action serves the employer's interest in the efficient and effective functioning of the office." *McCabe*, 12

F.3d at 1570. The court noted that the police chief produced substantial evidence that "loyalty and keeping confidences are required for proper performance of the job" from which the personal secretary was transferred and his concerns about possible disloyalty were not merely subjective fears, but "objectively reasonable" as a matter of common experience. *Id.* at 1571-73. Thus, the court afforded no deference to the police chief's view, and conducted its balancing based on an objective assessment.

In *Waters v. Chaffin*, the court considered whether a police chief could discipline a subordinate police officer for criticizing him in an off-duty conversation with another police officer. The court noted that the fact that "the employee who speaks out is a police officer does not mean that the balance is always struck in favor of the state. 'Policemen, like teachers and *lawyers*, are not relegated to a watered-down version of constitutional rights.' " *Id.* at 836 (quoting *Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S.Ct. 616, 620, 17 L.Ed.2d 562 (1967))(emphasis added). Although the court recognized that the law enforcement context justified allowing a police chief to act on reasonable predictions of harm, rather than actual evidence of harm, it also indicated that this rule is less appropriate when the chief officer and the affected officer do not work closely together, stating that "we will not allow a generalized concern to overshadow the realities of the case." *Chaffin*, 684 F.2d at 839-40. In addition, the court gave added weight to the fact that the subordinate's expression occurred off-duty. *Id.* at 837- 38.

Finally, as Judge Kravitch describes, the *McMullen* court considered whether a police chief could fire a low-level at-will clerical employee in the wake of strong community protests following an employee's announcement on television that he was a recruiter for the Ku Klux Klan. In weighing the balance of interests, the court noted the uncontradicted evidence that black citizens would categorically

distrust the sheriff's office if a known Klan member were allowed to remain on staff, and that the sheriff had "no less restrictive means of dealing with the problem." *McMullen*, 754 F.2d at 939. The court also noted that public perception of the Klan as a violent racist group was based on the reality of the Klan's history, and that absent immediate action on the sheriff's part, "serious conflict was almost certain to occur." *Id.* at 938-39. The court then conducted an "independent and complete review of the record," affording special weight to the task of a law enforcement agency, but not to the sheriff's assessment of what was reasonable. *Id.* at 940. After conducting this review the court concluded that:

> [t]he reaction of a community cannot always dictate constitutional protections to employees. We hold only that a law enforcement agency does not violate the First Amendment by discharging an employee whose active participation in an organization with a history of violent activity, which is antithetical to enforcement of the laws by state officers, has become known to the public and created an understandably adverse public reaction that seriously and dangerously threatens to cripple the ability of the law enforcement agency to perform effectively its public duties.

Id. at 940.

Instead of relying on the holdings in these cases, the majority references *McMullen*, *Sims v. Metropolitan Dade County*, 972 F.2d 1230 (11th Cir. 1992), *Kinsey v. Salado Independent School Dist.*, 950 F.2d 988 (5th Cir. 1992)(*en banc*), *Bates v. Hunt*, 3 F.3d 374 (11th Cir. 1993), and *Pickering* generally for the proposition that "government employees who have access to their employer's confidences or who act as spokespersons for their employers, as well as

those employees with some policy-making role, are in a special class of employees and might seldom prevail under the First Amendment in keeping their jobs when they conflict with their employers." Majority Op. at 1103. However, the cases cited by the majority simply do not support this proposition.

From *McMullen*, the majority draws the conclusion that a law enforcement official may act based on public perception and anticipated effect. But the majority ignores the fact that the *McMullen* court's conjectures about future harm were based on *present, actual* adverse public reaction to the affected employee's conduct. It also disregards the importance *McMullen* places on assessing the validity of public perceptions and the nature of the effect those perceptions would have on law enforcement. Indeed, *McMullen* supports the proposition that a government official cannot hide behind public perception as a means to enforce private prejudice. *See also Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S.Ct. 1879, 1882, 80 L.Ed.2d 421 (1984)("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

Sims addressed the question of the quantum of evidence necessary to overcome qualified immunity with a *Pickering*-based claim. *See Sims*, 972 F.2d at 1236. Because an individual seeking to overcome qualified immunity must show that an official has violated clearly established law, the *Sims* majority held that the plaintiff in that case had to make the extraordinary showing that "Pickering balancing would lead to the inevitable conclusion that the discharge of the employee was unlawful." *Id.* at 1237. To the extent that Sims is even relevant in other contexts, it does not stand for the broad proposition offered by the majority, since the case states only that "when the employee serves in a sensitive capacity that requires extensive public contact, the employee's private speech may pose a substantial danger to the

agency's successful functioning." *Id.* This assertion, of course, should not be shorn from its context -- namely, a case in which the *Pickering* analysis was purposefully conducted with a "thumb" on the government side of the scale because of the plaintiff's extraordinary burden in overcoming qualified immunity, an issue not on appeal in this case.

Kinsey v. Salado Indep. School Dist., 950 F.2d 988 (5th Cir. 1992)(*en banc*), is also largely inapposite, as that Fifth Circuit case involved the authority of a school board to remove the superintendent of schools, a position second only to the school board itself in terms of policy-making authority. More particularly, *Kinsey* involved a conflict of political affiliation between the two highest ranking education policy makers in the county. It thus cannot be read as support for the notion that "employees with some policy-making role . . . are in a special class of employees and might seldom prevail under the First Amendment," Majority Op. at 1103 (emphasis added).

The final case cited by the majority is *Bates v. Hunt*, 3 F.3d 374 (11th Cir. 1993). *Bates* arose from the decision of the Alabama Governor to fire an at-will political appointee in his Office of Constituent Affairs for signing an affidavit supporting a disgruntled former employee who had sued the Governor. The court determined that the essence of the appointee's job was to speak and act as a delegate of the Governor to his constituents. *Bates*, 3 F.3d at 378. Concluding that the Governor was not required to let an adversary represent him, the court found that the Governor's discharge of the appointee did not unconstitutionally burden the appointee's speech rights. As in *Kinsey*, the court in *Bates* tightly connected the particular job functions of the affected employee to the grounds for dismissal, a task the majority here ignores.

The political affiliation case law from the Supreme Court and this circuit simply cannot support the majority's broad assertion that government employees with "some policy-making role" enjoy only minimal job security when "they conflict with their employers." Majority Op. at 1103-04. In the leading political affiliation case, *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), the Supreme Court squarely rejected a chief public defender's attempt to terminate two disfavored assistant public defenders because they held confidential policy-making positions. In so ruling, the Court stated that "the ultimate inquiry is not whether the label 'policy maker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518, 100 S.Ct. at 1294.[5] Drawing an analogy to the current context,

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[5] The Court also recounted the rationale the district court advanced to rebut the idea that the assistant public defenders were appropriately viewed as policy making, confidential employees subject to discharge solely on the basis of their political affiliations. According to the district court, although the assistants had broad responsibilities with respect to particular cases that were assigned to them, they had limited, if any, responsibility for the overall operation of the office. *Branti*, 445 U.S. at 511, 100 S.Ct. at 1291. "They did not act as advisors or formulate plans for the implementation of the broad goals of the office, and although they made decisions in the context of specific cases, they do not make decisions about the orientation and operation of the office in which they work." *Id.* (internal quotations omitted). The district court also noted that the assistants "did not occupy any confidential relationship to the policy making process, and did not have access to confidential documents that influenced policy making deliberations." *Id.* Many of the same statements could be made about Shahar as a staff attorney. To the extent, then, that policy-making authority and confidentiality legitimately provide the Georgia Attorney General with a basis for deference in this case, it does not follow that all attorneys in his office have similar

(continued...)

Branti teaches that the ultimate inquiry for balancing purposes is not the nature of the job Shahar was assigned to, but whether the Attorney General can demonstrate that Shahar's intimate association hinders her ability to perform effectively the job of a staff attorney. The majority never considers how Shahar's relatively low status in the Attorney General's Office affects the balance, but instead implicitly treats all of the attorneys in the office as having equal responsibilities. It also overlooks the analysis of the district court in the Branti decision, which suggests that an assistant attorney's exercise of policy making authority and access to confidential information is not always of the sort that lessens his or her protected interests. *See supra* note 5.

Additionally, in the absence of any record evidence of "weighing" or "balancing" by the Attorney General, the majority attempts to provide after-the-fact reasons to support Bowers's side of the scale. Referencing a controversy in Georgia over issues related to homosexuality and "the Attorney General's involvement at the *heart of that controversy*" (Majority Op. at 1104 n.16)(emphasis added), the majority cites to four state court decisions decided after Shahar's termination (three of which did not involve the Attorney General's office), and three short Attorney General opinion letters, also written after Shahar's termination. However, the majority fails to mention post-termination evidence of Shahar's apparently successful performance within the legal community as a staff lawyer for the City of Atlanta.[6]

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[5] (...continued)
policy-making authority or similar confidential relationships with the Attorney General.

[6] Moreover, to the degree that Georgians have opinions about homosexuality, the law suggests their opinions are at least mixed. In Georgia's largest city, Atlanta, for instance, elected officials have passed a munici-
(continued...)

Similarly, the majority indicates that the public might reasonably conclude that Shahar engages in sodomy, and that such a belief would undermine the Department's efforts to enforce Georgia's "laws against homosexual sodomy." Majority Op. at 1105. The relevant Georgia statute, however, does not define sodomy in terms of sexual orientation.[7] The public cannot reasonably assume therefore that homosexuals in the Attorney General's office are more likely to engage in prohibited activity than any other member of that office.

While overemphasizing the Attorney General's concerns in the *Pickering* balance, the majority also discounts Shahar's interests. The majority never expressly identifies Shahar's claims that she has kept her relationship with her partner a largely private and decidedly low-key matter, and that she has not engaged in any conduct which is at odds with Georgia law. *See* Majority Op. at 1106-07.[8] Given the fact that it is not illegal in Georgia for two women to own a house in common, purchase insurance together or even exchange rings, it is difficult to understand how the fact that someone might discover these things could possibly affect the ability of the Attorney General to do his job effectively;

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[6] (...continued)
pal ordinance prohibiting discrimination on the basis of sexual orientation. *See City of Atlanta v. McKinney*, 265 Ga. 161, 454 S.E.2d 517, 519 (1995). *See also, In the Interest of R.E.W.*, 220 Ga.App. 861, 471 S.E.2d 6 (granting gay father unsupervised visitation rights with his child), *cert. denied*, 267 Ga. 62, 472 S.E.2d 295 (1996).

[7] *See* Ga. Stat. §16-6-2(a)("A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.").

[8] Although *McCabe* and *McMullen* also involved off-duty conduct, other factors, not present here, weighed in the balance against the employee in those cases.

the Attorney General is simply not charged with ensuring that his employees refrain from obtaining the blessing of their religious leaders prior to co-habitating in Georgia (which is essentially all Shahar has done).[9]

Finally, I believe that the Attorney General has an evidentiary burden to offer credible predictions of harm or disruption based on more than mere speculation. The Attorney General's "worry about his office being involved in litigation in which Shahar's special personal interest might appear to be in conflict with the State's position" is simply not a reasonable basis upon which to expect disruption. First, the record contains no evidence that homosexual issues in general constitute a "special personal interest" for Shahar. Indeed, Shahar was intended for an assignment involving the review of death penalty cases. Moreover, even if Shahar has a "special personal interest" in homosexual rights, such an interest tells us nothing about its disruptiveness to her work environment. Surely the Attorney General's office has lawyers who have a "special interest" in any number of topics: abortion, school desegregation, affirmative-action or rights for the disabled, for instance. When those issues arise and the Attorney General is forced to take a view, some attorneys may personally disagree with that view and may even ask not to work on the matter, but that does not establish that those views have been disruptive to the office as a whole. Absent hard evidence, it is difficult to imagine a

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[9] Georgia's recently enacted ban on same-sex marriages does not alter this analysis. Even if we assume that the statute is constitutional, it simply states that individuals who are involved in same-sex unions are not entitled to the full panoply of benefits available to individuals who are involved in opposite-sex unions. *See* O.C.G.A. §s 19-3-3.1. In so doing, the new statute implicitly acknowledges the right of same- sex couples to use the word "marriage" to describe their relationships. *See* O.C.G.A. §19-3-3.1(b)("No marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage.")

court upholding, for example, an Attorney General's assertion that he fired a black attorney because he believed (assumed?) that attorney's "special interest" in desegregated schools would prove disruptive to the office.

For these reasons, I respectfully dissent.

Robin Joy SHAHAR, Plaintiff-Appellant,

v.

Michael J. BOWERS, Individually and in his official capacity as Attorney General of the State of Georgia, Defendant-Appellee.

No. 93-9345.

United States Court of Appeals,
Eleventh Circuit.
March 8, 1996.

Appeal from the United States District Court for the Northern District of Georgia (No. 1:91-cv-2397-RCF), Richard C. Freeman, Judge.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion Dec. 20, 1995, 11th Cir., 1995, 70 F.3d 1218)

Before TJOFLAT, Chief Judge, and KRAVITCH, HATCHETT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES and BARKETT, Circuit Judges.*

BY THE COURT:

A member of this court in active service having requested a poll on the suggestion for rehearing en banc and a majority of the judges in this court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the above cause shall be reheard by this court en banc. The previous panel's opinion is hereby VACATED.

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* Senior U.S. Circuit Judge John C. Godbold has elected to participate in further proceedings in this matter pursuant to 28 U.S.C. §46(c).

Robin Joy SHAHAR, Plaintiff-Appellant,

v.

Michael J. BOWERS, Individually and in His Official Capacity as Attorney General of the State of Georgia, Defendant-Appellee.
No. 93-9345.

United States Court of Appeals,
Eleventh Circuit.
Dec. 20, 1995.

Before KRAVITCH, Circuit Judge, and GODBOLD and MORGAN, Senior Circuit Judges.

GODBOLD, Senior Circuit Judge:

The appellant Robin Joy Shahar is a homosexual female who was offered employment with the Department of Law of the State of Georgia to begin at a future date. She accepted the offer, but before the employment began she made known her plans to engage in a marriage ceremony with her female companion. The Attorney General of Georgia, who has ultimate responsibility for hiring and employment practices of the Department of Law, learned of her plans and, before the marriage ceremony took place, terminated the offer of employment.

Shahar sued the Attorney General under 42 U.S.C. §1983, alleging violation of her rights of intimate association, of her freedom of religion, and of equal protection and substantive due process. She sought declaratory and injunctive relief, including placement as a staff attorney in the Department and compensatory and punitive damages from the defendant in his individual capacity. The district court denied plaintiff's motion for summary judgment and granted defendant's motion for summary judgment.

The court unanimously agrees to affirm the conclusion

of the district court that Shahar's right of intimate association was burdened. The court holds, however, Judge Kravitch dissenting, that the district court erred in applying a balancing test to determine whether Shahar's rights under the Constitution were violated and that the case must be remanded to the district court for it to consider these issues under a strict scrutiny standard.[1]

The court affirms the summary judgment for the Attorney General on Shahar's free expression and equal protection claims for reasons set out by Judges Kravitch and Morgan in their separate opinions. Judge Godbold disagrees with these affirmances.

Shahar's claim of violation of substantive due process is not substantially presented on appeal. All judges agree that summary judgment for the defendant on that claim must be affirmed.

Shahar, then known as Robin Brown, worked as a law clerk in the Department of Law during the summer of 1990. During her clerkship she told other clerks that she was a lesbian. She talked with Mary Beth Westmoreland, an attorney with the Department, explained the relationship with her partner, Francine Greenfield, and discussed whether it would be appropriate to bring Greenfield to a picnic to be given by the departmental division in which Shahar was working. Westmoreland discouraged the proposal, and Shahar did not bring Greenfield to the picnic.

In September 1990 defendant offered Shahar a permanent position as a Department attorney to commence in the fall of 1991, and she accepted. She had been a Phi Beta

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[1] Since the district court granted summary judgment for Bowers on all claims it did not address his assertion of qualified immunity. If, on remand, Shahar reasserts claims for monetary damages, then that issue would have to be addressed.

Kappa as an undergraduate. She graduated from Emory Law School in the spring of 1991 with an outstanding academic record (sixth in her class academically), as an editor of the law review, and the recipient of a distinguished scholarship.

In the fall of 1990, following her acceptance, Shahar completed a standard personnel form of the Department. In the "Family Status" section she showed her "Marital Status" as "Engaged." In response to "Spouse" she added the word "Future" and inserted the name of Francine M. Greenfield. She identified her "Future Spouse's Occupation" as an employee of a department of the State of Georgia, her purpose being to reveal that Greenfield was employed by the State. The Department received the form and filed it without fully reviewing it.

In June of 1991, by telephone, Shahar discussed with Deputy Attorney General Bob Coleman her upcoming employment. He asked whether she could begin work in mid-September, and she responded that she would prefer to begin work later in the month in light of her upcoming wedding. Shahar did not tell Coleman that she planned marriage to another woman but did state that she would be changing her last name from Brown to Shahar. Coleman mentioned Shahar's upcoming wedding to Senior Assistant Attorney General Jeffrey Milsteen, who subsequently learned from Susan Rutherford, a Department attorney, that plaintiff's planned wedding would be to another woman. Rutherford and another Department employee had seen Shahar in a restaurant in the spring of 1991, and Shahar told them that she and her female dinner companion were preparing for their upcoming wedding.

Attorney General Bowers learned that the planned wedding was to another woman. He discussed the matter with his staff. Information conveyed to him included Shahar's personnel form, Coleman's description of his telephone con-

versation with Shahar, information concerning the restaurant encounter between Rutherford and Shahar, information of unspecified origin that Shahar planned to send or already had sent invitations to the ceremony and that some staff of the Department of Law were on the invitation list, and other information that, as the Attorney General described it, the planned ceremony would be "a big or church wedding, I don't remember which." The Attorney General talked with a female Jewish member of his staff, who told him the wedding was to be performed by a rabbi from New York who performed homosexual marriages but that "she was not aware of homosexual marriages or gay and lesbian marriages being recognized in Judaism."

The Attorney General wrote to Shahar on July 9, withdrawing the offer of employment. The letter said in part: This action has become necessary in light of information which has only recently come to my attention relating to a purported marriage between you and another woman. As the chief legal officer of this state inaction on my part would constitute tacit approval of this purported marriage and jeopardize the proper function of this office.

Before the wedding Brown and Greenfield changed their names to Shahar, which refers to being in a search for God.

On July 28 a rabbi performed a Jewish marriage ceremony for the couple, conducted in a state park in South Carolina. This suit was filed in October 1991.

I. The District Court's Findings

With respect to interference with intimate association, the court defined the relevant association as Shahar's relationship with her lesbian partner whom she intended to marry. It declined to decide whether this associational relationship fell within the definition of traditional family relationships described in *Roberts v. U.S. Jaycees*, 468 U.S. 609,

619-20, 104 S.Ct. 3244, 3250-51, 82 L.Ed.2d 462 (1984). It decided instead that it was within the "broad range of [constitutionally protected] human relationships" that *Roberts* described as falling between familial relationships and associations such as large business enterprises. *Id.* at 620, 104 S.Ct. at 3250.

The court then found, based on undisputed facts, and applying the balancing test of *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), that the defendant's articulated and unrebutted concerns regarding Shahar's employment outweighed her interests in the intimate association with her female partner. The court did not address Shahar's expressive association claim because it felt that it overlapped her free exercise claim and required no greater constitutional protection than her intimate association claim.

With respect to free exercise, the court assumed without deciding that defendant indirectly burdened Shahar's right to freely exercise her religion, but again it applied *Pickering* because it said it found no other controlling guideline, and it held that any burden suffered by Shahar was justified in light of the unique governmental concerns involved in efficient operation of the Department.

As to equal protection, Shahar contended that by withdrawing the offer of employment the defendant acted with intent to discriminate against her on the basis of her sexual orientation. The court held that defendant's classification, if any, was not based upon mere sexual orientation. It also found that, even if Shahar could establish that defendant acted in part based upon a general classification of plaintiff as a homosexual, she had not presented sufficient facts to raise a genuine issue of fact whether defendant acted with an impermissible intent to discriminate.

As to substantive due process, the court granted sum-

mary judgment because plaintiff conceded that she had no property interest in the promised employment and made no showing of deprivation of any liberty interest.

II. The Contours of Intimate Association

Shahar's position is that the district court correctly found that her intimate association was constitutionally protected but erred in applying the *Pickering* balancing test. The Attorney General's position is that the district court erred in finding that Shahar's association was constitutionally protected, but, if it was, the court correctly applied *Pickering* to find Shahar's associational interests were outweighed by the interests of the Attorney General.

The Attorney General treats the "marriage" planned by Shahar as a civil status governed by Georgia law, though Georgia law neither expressly forbids nor expressly authorizes same-sex marriage.[2] Georgia's statutory scheme, and its case law governing common-law marriages, repeatedly embrace the concept of marriage as being between persons of different genders.

Almost unanimously American cases have held that same-sex couples are not constitutionally entitled to attain the legal and civil status of marriage by obtaining a marriage license and complying with other requirements of the law of the jurisdiction. *Dean v. District of Columbia*, Civil Act. No. 90-13892, 1992 WL 685364 (D.C.Super.Ct. June 2, 1992), *aff'd*, 653 A.2d 307 (D.C.Ct.App.1995); *De Santo v. Barnsley*, 328 Pa.Super. 181, 476 A.2d 952 (1984)(common law marriage); *Singer v. Hara*, 11 Wash.App. 247, 522

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[2] The record does not show that the Attorney General knew, or inquired, where the ceremony would take place. Neither party has explored the law of South Carolina, where the wedding occurred, or considered what impact, if any, it might have on this case. Thus we focus on Georgia law, which both parties consider relevant.

P.2d 1187 (1974); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky.1973); *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972). *See also Adams v. Howerton*, 673 F.2d 1036 (9th Cir.)(whether or not valid under state law, marriage of two males does not confer spousal status under Federal Immigration Act), *cert. denied*, 458 U.S. 1111, 102 S.Ct. 3494, 73 L.Ed.2d 1373 (1982). Some cases state that marriage is inherently a relationship between persons of different genders and cannot have application to a same-sex couple. *Singer*, 522 P.2d 1187; *Jones*, 501 S.W.2d 588. The Supreme Court of Hawaii, however, has held that restricting marital relation to male and female establishes a sex-based classification subject to a strict scrutiny test in a state equal protection challenge. *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993).

Shahar did not assert when her job commitment was terminated, and has not asserted in this suit, that either the ceremony she planned or the status created by it was a Georgia civil marriage. Shahar does not assert that she desires or has sought a marriage license. She does not question the constitutionality of the Georgia licensing statute or any other of the provisions of Georgia law that speak in terms of marriage as a ceremony, and as a status, between persons of different sexes. Nor does she question the validity of Georgia principles of common law marriages.

What Shahar claims is that she proposed to -- and did -- engage in a Jewish religious ceremony that is recognized as a marriage ceremony by the branch of Judaism to which she adheres; that this conferred upon her and her partner a religious-based status that is apart from and independent of civil marriage as provided by Georgia law; and that she can accept, describe, and hold out both the ceremonial event and the status created by it by using the term "marriage." In ¶1 of her amended complaint Shahar alleged that she was

"fired" because of her participation "in a private religious ceremony of marriage." The rabbi performed a "Jewish marriage ceremony," ¶7, followed by "a weekend celebration of Jewish marriage," a "private religious marriage ceremony," ¶8. Plaintiff and her partner considered their "planned religious marriage" an important event, ¶9. Shahar has disclaimed any claim of "civil" or "legal" marriage pursuant to Georgia law. Her amended complaint alleged:

> 10. Plaintiff does not believe and has at no time represented either that her religious union with her partner carries with it any legal rights or that it constitutes a legal (civil) marriage. The ceremony was of a purely religious nature.

The intimate association Shahar asserts is not based upon false or sham assertions of religious belief, or hasty decision, or overnight conversion. She and her partner grew up in traditional Jewish families. Shahar attended Hebrew school from the third grade. She was bat mitzvahed at age 13 and continued in Hebrew school until she was confirmed at age 16. Greenfield grew up in a conservative, kosher, Jewish home. She went through Jewish training through high school, attended Jewish summer camps, and was involved in Jewish youth groups.

Shahar and Greenfield have been significant participants in the life of their synagogue, located in Atlanta. It is affiliated with the Reconstructionist Movement, one of several movements within Judaism. The synagogue serves gays, lesbians, and heterosexuals. The Reconstructionist Movement is regarded as liberal in some respects but is conservative in others. Shahar has led services at the synagogue and has given several sermons. She and Greenfield often attend together. The proposed ceremony was announced at a service of the synagogue.

Their rabbi, Sharon Kleinbaum, counseled them in eight

or nine formal premarital sessions and many informal ones. Rabbi Kleinbaum described the manner in which she satisfied herself of their commitment to the Jewish faith. She discussed with them "the seriousness of their commitment to the Jewish issues as well as to each other, and anything related to wedding ceremonies in general that, as a Rabbi, I would do." Dep. p.82. Continuing, she said, "I discussed with them the nature of their home life and the significance of Jewish practices to them and how it was inconceivable to them to do any kind of ceremony that was not a Jewish one." *Id.* at 83. Rabbi Kleinbaum considers that the union in which they joined is a public affirmation of their commitment to each other and to the Jewish people, having no legal significance but only personal and religious significance, and that it can be terminated only by the church.

The evidence demonstrates without dispute that same-sex marriage is accepted within the Reconstructionist Movement of Judaism, that Shahar and her partner are committed to that belief, and that, in keeping with their Jewish principles, they carefully and thoughtfully prepared for marriage.

The district judge had before him the depositions of three Jewish rabbis. Rabbi Kleinbaum, who performed the ceremony, formerly was associated with the Reconstructionist synagogue in Atlanta and has become rabbi of a New York synagogue which has the largest number of gay and lesbian attendants of any synagogue in the United States. A second rabbi who testified is the president of the National Organization of Rabbis of Reconstructionist Congregations. A third is a well-known rabbi from the Conservative Movement of Judaism. Fairly stated, the depositions do not demonstrate significant differences of fact but do reveal that Judaism in the United States does not have a monolithic view of same-sex marriages. The Reconstructionist Movement accepts the concept of same-sex marriage and many rabbis within the Movement perform such marriages. The

Reconstructionists are working on a manual that will help guide rabbis performing same-sex marriages. Other Movements in Judaism reject same-sex marriages. Still other Movements are divided in view, with some rabbis performing such marriages and others declining to do so. But the critical facts that emerge are that Shahar and her partner are lifelong adherents to Judaism and good-faith, dedicated participants in the Reconstructionist Movement; the Reconstructionist Movement is a significant movement within American Judaism; and it regards same-sex marriages as acceptable and desirable in preference to couples living together without marriage.

The actual ceremony between Shahar and Greenfield occurred after her job commitment was terminated. But it is relevant to her claim that her association has religious basis and status. The ceremony was the culmination of a weekend of religious-centered activities. Approximately 150 family and friends were invited and approximately 100 attended. Events began Friday evening with the celebration of the Hebrew Sabbath, which extends from Friday evening to Saturday evening. The wedding occurred on Sunday. Essentially the ceremony followed a traditional ceremony for a heterosexual Jewish couple except for deletion of the terms "bride" and "groom." It took place beneath a traditional huppah, or canopy. The couple signed a traditional Kutubah, or written marriage contract. They exchanged rings in traditional fashion. The traditional glass was broken. The traditional seven blessings were given, done in Hebrew and in English. Rabbi Kleinbaum was dressed in traditional garb. She described the event as a "Jewish religious ceremony," as a "Jewish marriage," and as a "Jewish wedding."

The Attorney General states his position this way: The Attorney General did not withdraw Shahar's offer of employment because of her association, religious or otherwise,

with other homosexuals or her female partner, but rather because she invoked the civil and legal significance of being "married" to another woman. Shahar is still free to associate with her female partner, as well as other homosexuals, for religious and other purposes. Brief, p.35. But he did not submit substantial evidence tending to show that Shahar "invoked the civil and legal significance of being 'married' to another woman." Shahar and Greenfield have been companions for several years. They jointly own the house in which they live, but their joint ownership began several years before this case arose and, in any event, joint ownership is not limited to persons married pursuant to Georgia civil law.[3] The couple benefit from an insurance rate (presumably on household or automobile insurance) lower than that available to single women. But, under the undisputed evidence, Shahar talked to the insurance agent, explained that she was going to undergo a religious ceremony with her female partner, described and explained the ceremony, and asked if the company would consider giving them the rate available to married women, and the company agreed to do so.

The intimate relationship between Shahar and her partner whom she planned to marry did not involve marriage in a civil, legal sense but it was inextricably entwined with Shahar's exercise of her religious beliefs. The court holds that the district court did not err in defining that intimate relationship as constitutionally protected.[4]

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[3] O.C.G.A. §§44-6-120 & 44-6-190.

[4] Neither the Supreme Court nor any circuit court has held that an association based solely upon the sexual orientation of a same-sex couple is an intimate association having constitutional protection. The district court has not so held in this case and neither do we.

III. Scope of Review of Intimate Association

The district court used the *Pickering* balancing test. The court holds, Judge Kravitch dissenting, that strict scrutiny must be utilized.

The difficulty of identifying a correct standard of review is demonstrated by the lengthy analysis in *McCabe v. Sharrett*, 12 F.3d 1558 (11th Cir. 1994)(noting three possible standards -- *Pickering, Elrod-Branti*, and strict scrutiny). *Pickering* arose in the context of free speech, and the line of cases following it have applied most often to those involving freedom of speech or expressive association, and they give somewhat more deference to the employer. The *Elrod*[5] and *Branti*[6] line of cases are variants of strict scrutiny that focus on the effects of political beliefs on the job performance of public employees and have not been applied outside of the political patronage context. *See McCabe*, 12 F.3d at 1567.

The court believes that the general standard of strict scrutiny is applicable to Shahar's intimate association claim and that the acts of the Attorney General must be deemed to infringe on Shahar's rights unless shown to be narrowly tailored to serve a compelling governmental interest. Shahar was not engaged in political commentary. Marriage in the conventional sense is an intimate association significant burdens on which are subject to strict scrutiny. *Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978). Though the religious-based marriage in which Shahar participated was not marriage in a civil, legal sense it was intimate and highly personal in the sense of affection, commitment, and permanency and, as we have spelled out,

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[5] *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

[6] *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980).

it was inextricably entwined with Shahar's exercise of her religious beliefs. Strong deference must be given to her interests and less to the employer's interest than in a *Pickering*-type case.

IV. Expressive Association

Shahar also asserts that Bowers violated her right to expressive association. Opening Brief, 36 n.7; Reply Brief, 12 n.6. Expressive association is the "right to associate for the purpose of engaging in those activities protected by the First Amendment . . . [, including] the exercise of religion." *Roberts*, 468 U.S. at 618, 104 S.Ct. at 3249. The right of expressive association may be limited by regulations which serve a compelling state interest. *Id.* at 623, 104 S.Ct. at 3252 ("Infringements on [the right to expressive association] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."). *See also Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549, 107 S.Ct. 1940, 1948, 95 L.Ed.2d 474 (1987) ("Even if the Unruh Act does work some slight infringement on Rotary members' right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women.").[7] The district court did not address Shahar's expressive association claim because of its overlap with her free exercise claim and the court's conclusion that her expressive association claim required no greater constitutional protection than her intimate association claim. The court,

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[7] This court instructed a district court to apply the *Pickering* balancing test in a similar expressive association claim, *Hatcher v. Board of Pub. Educ. & Orphanage*, 809 F.2d 1546, 1559 & n. 26 (11th Cir. 1987). But the Supreme Court applied the compelling interest test in *Rotary*, which was decided subsequent to *Hatcher*.

Judge Kravitch dissenting, remands this claim for consideration by the district court under the compelling interest test.

V. Freedom of Religion

The district court applied the balancing test of *Pickering* to Shahar's free exercise claim after considering the restrictions placed by *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed. 2d 876 (1990), on the traditional compelling interest test articulated in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). *Smith* had sharply criticized *Sherbert* and essentially limited it to the unemployment benefits context. 494 U.S. at 883-85, 110 S.Ct. at 1602-04.

For reasons set out in Part II, the writer would hold that Shahar asserted a free exercise claim and would remand this claim to the district court for it to reconsider under the compelling interest test. Judges Kravitch and Morgan do not agree with this view.

VI. Equal Protection

Federal courts have concluded that homosexuals, as a class, do not receive heightened scrutiny when their equal protection claims are analyzed, and accordingly, the courts have applied the rational basis test to such claims. *See, e.g., Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 266 n.2 (1995)(amendment to city charter denying special status and legal protection based on sexual orientation); *Jantz v. Muci*, 976 F.2d 623, 630 (10th Cir. 1992)(applicant for public high school teacher and coach position), *cert. denied*, 508 U.S. 952, 113 S.Ct. 2445, 124 L.Ed.2d 662 (1993); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989)(U.S. Army Reserves sergeant), *cert. denied*, 494 U.S. 1004, 110 S.Ct. 1296, 108 L.Ed.2d 473 (1990); *Padula v. Webster*, 822 F.2d 97, 103 (D.C.Cir. 1987)(applicant for FBI special agent). *But see Watkins v.*

U.S. Army, 875 F.2d 699, 728 (9th Cir. 1989)(en banc)(Norris, J., concurring in judgment and declaring homosexuals to be a suspect class), *cert. denied*, 498 U.S. 957, 111 S.Ct. 384, 112 L.Ed.2d 395 (1990). The writer would hold that the court need not consider whether homosexuals are, by that status alone, a class deserving a heightened scrutiny when alleging violations of the equal protection clause because, without the court's making that determination, the facts of this case require the application of strict scrutiny to Shahar's equal protection claim.

Shahar's classification or characterization is not that of homosexuality alone. Rather she is a homosexual engaging in the exercise of her religious faith, including her religious ceremony of marriage and her right to accept, describe and hold out the event and the status created by it by using the term "marriage." "[W]here a constitutional 'fundamental right' is assaulted by operation of [a government regulation], . . . the enactment 'will be sustained only if [it is] suitably tailored to serve a compelling state interest.'" *Equality Found.*, 54 F.3d at 266 (quoting *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)). *Cf. San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (Court disagreed with respondents' contention that education was a fundamental right and held that rational basis review applied); *Price v. Tanner*, 855 F.2d 820, 823 n. 7 (11th Cir. 1988)(because the appellant did not allege the existence of a suspect class or burdened fundamental right, strict scrutiny would not apply), *cert. denied*, 489 U.S. 1081, 109 S.Ct. 1534, 103 L.Ed.2d 839 (1989); *Tarter v. James*, 667 F.2d 964, 969 (11th Cir. 1982)(no fundamental right was involved, so rational basis review applied). *See also* Laurence H. Tribe, *American Constitutional Law* §§16-7 -- 16-11, §16-12 at 1464 (2d ed. 1988)("[E]qual protection analysis demands strict scrutiny . . . of classifications that penalize

rights already established as fundamental for reasons unrelated to equality . . . ."); John E. Nowak & Ronald D. Rotunda, *Constitutional Law* §14.3 (4th ed. 1991).

The Supreme Court has used equal protection analysis, and a strict scrutiny standard, to consider state legislation that allegedly burdened individuals' right to marry, *Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978)(statute forbidding marriage by any person with minor children not in his/her custody and which the person is under obligation by court order to support); *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (statute forbidding miscegenation); right to procreate, *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942)(habitual criminals subjected to sterilization); right to travel, *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974)(residency requirement for indigents in order to receive non-emergency medical care); *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972)(residency requirements for voting); *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969)(residency requirements for welfare recipients); and right to vote, *Dunn*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (residency requirements for voting); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969)(those without children in the school system or who did not own or lease taxable property were ineligible to vote in school district elections). *Cf. Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975)(appearing to apply a strict scrutiny standard but deciding that state interests override the individual's interest where state law required residency for at least one year prior to petitioning for divorce).

The writer, Judges Kravitch and Morgan disagreeing, would remand the equal protection claim to the district court for analysis under the strict scrutiny standard.

VII. Mandate of the Court

The decision of the district court that Shahar's intimate association rights were violated is AFFIRMED. The summary judgment for defendant on this claim is VACATED and it is REMANDED to the district court for it to determine under a strict scrutiny standard whether this violation infringed Shahar's constitutional rights. The claim of violation of expressive association may be addressed by the district court on remand.

Summary judgment for the defendant on the free exercise, equal protection, and substantive due process claims is AFFIRMED.

MORGAN, Senior Circuit Judge, concurring in part and concurring in result:

I concur in parts II, III, and IV of Judge Godbold's opinion which hold that Shahar's rights of intimate and expressive association have been burdened and that strict scrutiny is the proper test to apply. For this reason, it is necessary to remand the case to the district court. Nevertheless, I respectfully disagree with Judge Godbold that the facts underlying Shahar's association claims necessarily translate into a Free Exercise claim that requires strict scrutiny. Thus, I do not join in Part V of his opinion.

Furthermore, I disagree with Part VI of Judge Godbold's opinion as it pertains to Shahar's Equal Protection claim. Generally, the Equal Protection Clause of the Constitution requires that a state classification be rationally related to a legitimate state interest. *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 2331, 120 L.Ed.2d 1 (1992); *Panama City Medical Diagnostic Ltd.*, 13 F.3d 1541, 1545 (11th Cir.)., *reh. denied*, 21 F.3d 1127 (11th Cir.), *cert. denied*, 513 U.S. 826, 115 S.Ct. 93, 130 L.Ed.2d 44 (1994). A rational basis will not suffice, however, in cases involving

either a suspect class or a fundamental right. *Kadrmas v. Dickinson Pub. Schools*, 487 U.S. 450, 457-58, 108 S.Ct. 2481, 2487-88, 101 L.Ed.2d 399 (1988); *Panama City*, 13 F.3d at 1545. In such a case, the strict scrutiny test must be applied. Many courts include religion as a classification or fundamental right that deserves strict scrutiny. *See Droz v. Commissioner of I.R.S.*, 48 F.3d 1120, 1125 (9th Cir. 1995) (discussing equal protection under the Fifth Amendment); *Steffan v. Perry*, 41 F.3d 677, 689 n. 9 (D.C.Cir. 1994); *Olsen v. Commissioner*, 709 F.2d 278, 283 (4th Cir. 1983) (discussing equal protection under the Fifth Amendment); *Seoane v. Ortho Pharmaceuticals, Inc.*, 660 F.2d 146, 149 (5th Cir. 1981); *see also Johnson v. Robison*, 415 U.S. 361, 375 n.14, 94 S.Ct. 1160, 1169 n.14, 39 L.Ed.2d 389 (1974) (noting that the free exercise of religion is a fundamental right under the Constitution). Judge Godbold's opinion is based upon the argument that Shahar has an Equal Protection claim due to her fundamental right to exercise her religious beliefs. I believe this to be a mistake. Shahar has not brought before us an Equal Protection claim based on a fundamental religious right. Instead, as Judge Kravitch points out in her opinion, Shahar is arguing her homosexuality as a suspect class.[1] Thus, since Shahar has failed to raise reli-

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[1] The portion of Shahar's appellate brief discussing Equal Protection makes numerous references to a homosexual classification claim, but it is devoid of any reference to a religious fundamental rights claim. *See, e.g.*, Appellant's Brief (filed May 13, 1994) at 42 ("Shahar's equal protection claim rests on her contention that, as a homosexual, she was judged by Bowers . . . differently than a heterosexual would have been judged."), at 44 ("Shahar's claim, however, is precisely that her conduct, as a homosexual, was evaluated differently."), at 45-46 ("Here, Shahar's direct evidence of being judged differently as a homosexual . . . can fully establish the viability of her sexual orientation discrimination claim . . ."), at 47 ("All of the background to Shahar's firing underscores that her acknowledged relationship with another woman triggered differen-

(continued...)

gion as an issue with respect to her Equal Protection claim, I join with Judge Kravitch in affirming that portion of the district court's order.[2]

Turning to Shahar's contention that her homosexuality entitles her to the designation of being in a suspect class, I note that such an argument has been universally rejected by the courts that have considered it. *See, e.g., Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004, 110 S.Ct. 1296, 108 L.Ed.2d 473 (1990); *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984); *see also High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir.)(discussing issue in the context of the Fifth Amendment), *reh. denied*, 909 F.2d 375 (9th Cir. 1990). As pointed out by Shahar, it is true that this circuit has not ruled on the issue. Nevertheless, I agree with Judge Kravitch that the facts of this case do not require us now to make a determination. The evidence supports the district court's conclusion on summary judgment that Bowers did not revoke Shahar's job offer because of her sexual orientation. Instead, the dispute arose because Bowers believed that Shahar invoked the legal and civil significance of being married to another female, which is inconsistent with Georgia law.[3] Therefore, I do not believe the evidence supports

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[1] (...continued)
tial, adverse judgments about homosexuals versus heterosexuals . . ."), and at 48 ("Shahar urges . . . that, under the governing criteria, discrimination against gay people warrants heightened equal protection scrutiny.").

[2] I express no opinion as to the merits of Shahar's claim had it been presented as a religious fundamental rights question.

[3] Shahar does not challenge the state of the law as it exists in Georgia with respect to same sex marriages.

Shahar's Equal Protection claim.

For the reasons set forth above, I concur in Judge Godbold's opinion only to the extent that the burdens placed upon Shahar's intimate and expressive association claims are subject to strict scrutiny. Thus, I concur in the result that this case should be remanded to the district court for further consideration.

KRAVITCH, Circuit Judge, concurring in part and dissenting in part:

In my view, this case is not primarily about religion or expression or equal protection. Rather, the constitutional deprivation suffered by Shahar[1] is the burdening of her First Amendment right of intimate association. In the public employment context, an employee's intimate association rights must be balanced against the government's legitimate concerns with the efficient functioning of its agencies. I therefore disagree with the majority's holding that strict scrutiny ought to be applied in this case. Nonetheless, utilizing a balancing test, I conclude that Shahar is entitled to constitutional protection.

I. Intimate Association

A. Shahar's commitment ceremony and relationship with Greenfield is an intimate association entitled to First Amendment protection.

Intimate associations involve "choices to enter into and maintain certain intimate human relationships." *Roberts v.*

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[1] The plaintiff-appellant and her partner legally changed their surnames from "Brown" and "Greenfield," respectively, to "Shahar," which they understood to mean in Biblical Hebrew "[t]he act of seeking God." Shahar Dep. at 23. For the sake of clarity, I will refer to the plaintiff-appellant as "Shahar" and to her partner as "Greenfield."

United States Jaycees, 468 U.S. 609, 617-18, 104 S.Ct. 3244, 3249, 82 L.Ed.2d 462 (1984). Such choices "must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Id.* In *Roberts*, the Supreme Court enumerated several characteristics typical of relationships entitled to constitutional protection as intimate associations: "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Id.* at 620, 104 S.Ct. at 3250. Family relationships, which "by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life," "exemplify" -- but do not exhaust -- this category of protected associations. *Id.*; *see also Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 545, 107 S.Ct. 1940, 1946, 95 L.Ed.2d 474 (1987) ("[W]e have not held that constitutional protection is restricted to relationships among family members."); Kenneth L. Karst, "The Freedom of Intimate Association," 89 Yale L.J. 624, 629-37 (1980)(defining intimate association as "a close and familiar personal relationship with another that is in some significant way *comparable* to a marriage or family relationship")(emphasis added). A relationship that fits these descriptions is no less entitled to constitutional protection just because it is between individuals of the same sex.

This court has taken an expansive view of the right of intimate association under the First Amendment, protecting even dating relationships. *See Hatcher v. Bd. of Educ. & Orphanage*, 809 F.2d 1546, 1558 (11th Cir. 1987)("[E]ven a public employee's association choices as to whom to date enjoy constitutional protection."); *Wilson v. Taylor*, 733 F.2d

1539, 1544 (11th Cir. 1984)("We conclude that dating is a type of association which must be protected by the first amendment's freedom of association.").

I agree with the district court and the majority that the relationship between Shahar and her partner qualifies as a constitutionally protected intimate association. The ceremony was to solemnize and celebrate a lifelong commitment between the two women, who share not only an emotional bond but, as the majority exhaustively describes, a religious faith.[2] Even if Shahar and Greenfield were not religious, I would still find that their relationship involves the type of personal bond that characterizes a First Amendment intimate association.[3] We protect such associations because "the 'ability independently to define one's identity that is central to any concept of liberty' cannot truly be exercised in a vacuum; we all depend on the 'emotional enrichment from close ties with others.' " *Bowers v. Hardwick*, 478 U.S. 186, 205, 106 S.Ct. 2841, 2851, 92 L.Ed.2d 140 (1986) (Blackmun, J., dissenting)(quoting *Roberts*, 468 U.S. at 618, 104 S.Ct. at 3250). Where intimacy and personal identity are so closely intertwined as in the relationship between Shahar and Greenfield, the core values of the intimate association right are at stake.

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[2] Shahar has described Greenfield as her "life partner," elaborating, "Fran is my best friend and she is my main confidante, and there is just a certain closeness with her that I don't share with others." Shahar Dep. at 5-6.

[3] To avoid confusion, my view is that relationships possessing the characteristics cataloged above -- "smallness," "selectivity," "seclusion," "deep attachment[ ] and commitment[ ]," etc. -- warrant constitutional protection *irrespective* of (not because of) the sexual orientation of the individuals involved.

B. Shahar's intimate association rights were burdened by Bowers' withdrawal of her job offer.

A public employee's freedom of association is burdened by adverse employment action if the protected association was a "substantial" or "motivating" factor in the employer's decision. *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977); *Hatcher v. Board of Pub. Educ.*, 809 F.2d 1546, 1558 (11th Cir. 1987).[4] Bowers argues that he withdrew Shahar's offer of employment only because she publicly "held herself out" as to be legally married, not because of the planned commitment ceremony or relationship per se, and therefore that Shahar's right to associate with her partner was not threatened. I agree with the district court, however, that Shahar's "conduct ('holding herself out' as about to marry another woman) is not sufficiently separate from her intimate association (marrying another woman) to allow a finding that this association was not burdened." *Shahar v. Bowers*, 836 F.Supp. 859, 863 (N.D.Ga.1993).

The evidence Bowers presents of Shahar's "holding herself out" as legally married is less than compelling. As the majority observes, Shahar has never asserted -- and in fact has repeatedly disclaimed -- any civil or legal status as married. What Shahar did do was plan and participate in a private, religious, out-of-state, commitment ceremony. She did

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[4] Under *Mt. Healthy* causation analysis, even if the employee proves that the conduct at issue is constitutionally protected and was a "substantial factor" in the government's decision to take adverse employment action, the government employer will still prevail if it can show by a preponderance of the evidence that it would have reached the same decision even in the absence of the employee's protected conduct. *Mt. Healthy*, 429 U.S. at 285-87, 97 S.Ct. at 575-76. Nothing in the record of this case, however, indicates that Bowers would have withdrawn Shahar's employment offer if she had not planned to participate in the commitment ceremony.

not place an announcement in the newspaper or cast the ceremony as a political or religious rally. Shahar did characterize her marital status as "engaged" and identify Greenfield as her "future spouse" on a Department form, the purpose of which was "to elicit information which might be relevant to whether there would be some sort of conflict in [the Department's] representation of" another part of state government.[5] In so doing, Shahar provided the relevant information (Greenfield was, in fact, employed by the state) as best she could within the constraints of the standardized form, which in any case was filed unread and would never have been visible to the public. Shahar also chatted about "wedding" preparations with two Department co-workers after encountering them by chance in a restaurant while she and Greenfield were planning the ceremony. Finally, for the purpose of arranging her starting date, she notified a Department administrator that she was "getting married" and changing her last name to "Shahar," and she discussed the planned timing of her "wedding."[6] All of these mentions by Shahar of her planned ceremony were reactive, responding to requests for information.[7]

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[5] Bowers Dep. at 33-34.

[6] Shahar Dep. at 77.

[7] Shahar's occasional use of the words "marriage" and "wedding" to describe the ceremony she and Greenfield were preparing to undertake hardly amounts to flaunting Georgia law. Neither "marriage" nor "wedding" is a proprietary legal term. Rabbi Friedlander testified that "marriage" is the appropriate English translation of the Hebrew term for the Jewish wedding rituals followed by Shahar and Greenfield. Friedlander Dep. at 48-50. And one of the English meanings of "marriage" is simply "an intimate or close union." Webster's Third New Int'l Dictionary (1961). Shahar might have been better served had she been consistent in referring to Greenfield as her "partner," and the event at issue as a "commitment ceremony." On the other hand, in response to a deposition

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Given the limited extent of Shahar's pre-termination publicizing of her commitment ceremony in terms that could be misunderstood as implying a legal relationship, I conclude, as did the district court, that Shahar "pursued her desired association only at the price of her desired employment." *Shahar*, 836 F.Supp. at 863.

C. Intimate association claims in the public employment context are subject to a balancing test.

The majority determines that because Shahar was involved in an intimate association akin to marriage and because the relationship was intertwined with religion, strict scrutiny should be applied. While I agree that heightened scrutiny is appropriate in cases where a public employee's First Amendment association rights have been burdened, it is also necessary to take into account the legitimate interests of government employers. These competing concerns lead me to a "balancing" analysis similar to both the test described in *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), and strict scrutiny as it has been applied in public employment cases.

This case must be understood in light of the public employment context in which it arises. "[T]he government as employer indeed has far broader powers than does the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, ___, 114 S.Ct. 1878, 1886, 128 L.Ed.2d 686 (1994)

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[7] (...continued)
question about her use of the word "engaged" to describe her relationship with Shahar, Greenfield replied: We are limited by language. It is sort of derived for heterosexuals. We use the language because we don't have a better one to explain what we are talking about, but it describes that there is a sense of a commitment relationship, there is a union to take place, this person is part of my family . . . .

Greenfield Dep. at 28.

(plurality opinion). The supplemental power afforded the government over its employees is justified by "the practical realities of government employment," *id.* at ___, 114 S.Ct. at 1886, and the fact that "the government is employing someone for the very purpose of effectively achieving its goals," *id.* at ____, 114 S.Ct. at 1888. "The key to First Amendment analysis of government employment decisions . . . is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Id.*

Neither the Supreme Court nor the Eleventh Circuit has determined the precise standard to be applied to an employee's intimate association claim against a government employer. As the majority points out, the court in *McCabe v. Sharrett*, 12 F.3d 1558 (11th Cir. 1994), identified and discussed the three most likely standards of review for this type of case: strict scrutiny,[8] *Pickering*,[9] and *Elrod-Branti*.[10] The issue of which standard to apply in intimate

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[8] Under strict scrutiny, the government must show that its action is "narrowly tailored to serve a compelling government interest." *McCabe*, 12 F.3d at 1566.

[9] *See Pickering v. Board of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). The *Pickering* analysis was developed in the context of an adverse employment action on the basis of a public employee's speech. Under *Pickering*, courts balance "the interests of the [employee], as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *McCabe*, 12 F.3d at 1564 (quoting *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734).

[10] *See Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). Under the *Elrod-Branti* analysis, which was developed in the context of an adverse employment action based upon a public employ-

(continued...)

association cases remains unsettled after *McCabe*, however, for in that case the court determined that the employee's association rights were not violated under any of the three standards considered. *McCabe*, 12 F.3d at 1569-74. In reaching this conclusion, the court noted that "[a]ll three of these schemes provide the government employer some opportunity to demonstrate that governmental interests justified the challenged employment action." *Id.* at 1569 n.14.

A survey of intimate association cases (and analogous privacy cases) in the context of public employment reveals that courts, irrespective of the doctrinal test being applied, have consistently balanced the interest of the government employer in the efficient functioning of its office against the employee's interest in pursuing his or her constitutionally protected freedom.[11]

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[10] (...continued)
ee's political affiliation, courts "look to whether party affiliation is important to effective performance of the job at issue." *McCabe*, 12 F.3d at 1565. Because the *Elrod-Branti* analysis has been limited to the context of political patronage, I will exclude it from further consideration in the intimate association context.

[11] *See Whisenhunt v. Spradlin*, 464 U.S. 965, 970-72, 104 S.Ct. 404, 408-09, 78 L.Ed.2d 345 (1983)(Brennan, J., joined by Marshall and Blackmun, JJ., dissenting from denial of cert.)(calling for heightened scrutiny for employees' due process privacy claims, but recognizing that "[p]ublic employers . . . deserve considerable latitude in enforcing codes of conduct"); *Kelley v. Johnson*, 425 U.S. 238, 244-49, 96 S.Ct. 1440, 1444-46, 47 L.Ed.2d 708 (1976)(balancing police officer's liberty interest in personal appearance against police department's need to regulate the hair length of its officers, after suggesting that state employees may be subject to more restrictive regulations where their less fundamental rights are at stake); *Stough v. Crenshaw County Bd. of Educ.*, 744 F.2d 1479 (11th Cir. 1984)(applying *Pickering* balancing test to school board employee's constitutional challenge to policy prohibiting school board employees from sending their children to private schools); *Wilson v.*
(continued...)

I conclude that in the context of a public employee's intimate association claim based on adverse employment action, the heightened scrutiny applied by some courts is no different in practice from the Pickering balancing test applied by others. Both necessitate balancing the employee's constitutional association rights against the government's interest in the efficient functioning of its agency. Although *Pickering* and its direct descendants are free speech cases,

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[11] (...continued)
Taylor, 733 F.2d 1539, 1542-44 (11th Cir. 1984)(assuming that *Pickering* is the appropriate standard for police officer's intimate association claim); *Dike v. School Bd.*, 650 F.2d 783, 787 (5th Cir. Unit B 1981) (nominally applying strict scrutiny to school board's burden on employee's liberty interest in breast-feeding her child, but remanding for consideration of whether school board's interests in avoiding disruption of educational process, ensuring that teachers perform their duties without distraction, and avoiding potential liability for accidents were strong enough to justify the burden); *Fyfe v. Curlee*, 902 F.2d 401 (5th Cir. 1990)(applying *Pickering* balancing to public school employee's First Amendment privacy claim arising out of termination due to decision to send her daughter to private school); *Thorne v. City of El Segundo*, 726 F.2d 459, 468-72 (9th Cir. 1983)(applying sliding-scale scrutiny, so that "[t]he more fundamental the rights on which the state's activities encroach, the more weighty must be the state's interest in pursuing that course of conduct," to employee's privacy and intimate association claims); *Kukla v. Village of Antioch*, 647 F.Supp. 799, 803-12, 806 (N.D.Ill. 1986)(analyzing employee's intimate association claim by "weighing the amount of constitutional protection given to the conduct in question against the extent to which restriction of it is necessary for the government agency to function"); *Briggs v. North Muskegon Police Dept.*, 563 F.Supp. 585 (W.D.Mich. 1983)(balancing police officer's intimate association and privacy rights against police department's interest in officer's job performance), *aff'd without opinion*, 746 F.2d 1475 (6th Cir. 1984), *cert. denied*, 473 U.S. 909, 105 S.Ct. 3535, 87 L.Ed.2d 659 (1985); *Childers v. Dallas Police Dept.*, 513 F.Supp. 134, 139-42 (N.D.Tex. 1981)(applying *Pickering* balancing test to city employee's First Amendment association claim), *aff'd without opinion*, 669 F.2d 732 (5th Cir. 1982).

their motivating principle -- optimizing protection of government employees' fundamental constitutional rights and the effective provision of public services by government agencies -- applies equally to intimate association cases under the First Amendment. Like core First Amendment speech, which the Supreme Court has protected in the *Pickering* line of cases as a "fundamental right" of which citizens must not be deprived just "by virtue of working for the government," *Connick v. Myers*, 461 U.S. 138, 147, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983), the right of intimate association is a fundamental aspect of personal liberty, *Roberts*, 468 U.S. at 617-21, 104 S.Ct. at 3249-51, 82 L.Ed. 2d 462. But it is also true that an employee may disrupt the efficient workings of a government office with First Amendment *conduct* as well as speech. Balancing is equally appropriate in both contexts.[12]

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[12] One aspect of how *Pickering* free speech analysis maps onto intimate association cases might be misleading. In *Connick*, the Supreme Court made clear that a government employee can be protected under *Pickering* only if the speech in question relates to "matters of public concern." 461 U.S. at 147, 103 S.Ct. at 1690. Obviously, it would be paradoxical to require a government employee's intimate association to relate to a matter of public concern as a threshold requirement for constitutional protection. The point of the *Connick* requirement, however, is simply to operationalize *Pickering*'s purpose of upholding only the more fundamental rights of public employees and not turning federal courts into general review boards for personnel decisions. *Id.* Speech on matters of public concern is given categorical protection under *Pickering* and *Connick* because this type of speech "occupies 'the highest rung of the hierarchy of First Amendment values.'" *Id.* at 145, 103 S.Ct. at 1689 (quoting *Carey v. Brown*, 447 U.S. 455, 467, 100 S.Ct. 2286, 2293, 65 L.Ed.2d 263 (1980)).

Therefore, inasmuch as Connick may be instructive in the intimate association context, it reaffirms the appropriateness of the sliding-scale scrutiny inherent in a balancing test that weighs intimate associations closer to the core of the First Amendment right more heavily than those closer to the periphery.

D. Shahar's intimate association rights outweigh Bowers' legitimate interests in this case.

The district court applied the *Pickering* balancing test to *Shahar*'s intimate association claims. The court correctly noted that Bowers' asserted interests embody two overarching concerns: (1) public credibility, specifically the need to avoid the appearance of endorsing conflicting interpretations of Georgia law, and (2) internal efficiency, specifically the need to employ attorneys who act with discretion, good judgment, and in a manner which does not conflict with the work of other Department attorneys. *Shahar*, 836 F.Supp. at 864. Proceeding to find sufficient evidentiary support for Bowers' articulated concerns, the district court concluded that "the unique circumstances of this case show that [Bowers'] interests in the efficient operation of Department outweigh [Shahar's] interest in her intimate association with her female partner." *Id.* at 865. Absent from the district court's "balancing" discussion, however, is an explicit juxtaposition of Shahar's intimate association rights or any discussion of their countervailing weight.

The relationship celebrated through Shahar's and Greenfield's commitment ceremony is close to the core of the constitutional right to intimate association, for it exemplifies the characteristics determined by the Supreme Court to warrant special protection. In *Roberts*, the Court explained that between the poles of "family" relationships and large business enterprises "lies a broad range of human relationships that may make greater and lesser claims to constitutional protection from particular incursions by the State." *Id.* at 618-22, 104 S.Ct. at 3250-51. Because Shahar's commitment ceremony and relationship with Greenfield fall close to the "family" end of this continuum, her intimate association rights weigh heavily on the balance.

On the other hand, Bowers is the chief legal officer of

the state of Georgia, with responsibility for "seeing that State agencies uphold the law and [for] upholding the law in general."[13] Although Georgia does not have a statute which prohibits same-sex "marriages," and Shahar violated no law by planning and participating in the commitment ceremony with her partner, the state does not officially recognize such a union and would not authorize the issuance of a marriage license to a same-sex couple.[14]

Bowers does not allege that Shahar's planned ceremony caused any actual disruption of the functioning of the Georgia Department of Law. Although we must consider a government employer's "reasonable predictions of disruption," *Waters*, 511 U.S. at ___, 114 S.Ct. at 1887, the employer's assessment of harm should be discounted by the probability of its realization in order to weigh it fairly against an actual burden on an employee's constitutional rights. Certainly, the mere "subjective apprehension that [the employee's conduct] might have an adverse impact upon" the government agency will not outweigh such a burden. *Williams v. Roberts*, 904 F.2d 634, 638 (11th Cir. 1990).

Bowers first determined that Shahar's "holding herself out as 'married' to another woman . . . indicated a lack of discretion regarding the Department's public position on the proper application for the [Georgia] sodomy statute and

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[13] Bowers Dep. at 42.

[14] Nor does Georgia recognize same-sex common-law marriages. *See* O.C.G.A. §19-3-1; *Georgia Osteopathic Hosp., Inc. v. O'Neal*, 198 Ga.App. 770, 403 S.E.2d 235, 243 (1991)("In order for a common-law marriage to come into existence, the parties must be able to contract, must agree to live together as man and wife, and must consummate the agreement.").

Georgia's marriage laws."[15] Shahar's pre-termination conduct, however, seems unrelated to the Department's legal positions. Second, Bowers characterized Shahar's representations about her commitment ceremony as "political conduct demonstrating that she did not believe in and was not going to uphold the laws regarding marriage and sodomy."[16] But there is no evidence in the record to support such an inference; to the contrary, Shahar has never asserted any legal benefit from her marriage, and her commitment ceremony was far from a political demonstration or an act of civil disobedience. In any case, the Department has a rule against certain political activities, which Shahar had understood to preclude advocacy on behalf of, for instance, gay rights.[17] Third, Bowers makes the general assertion that Shahar's presence in the Department would have a "disruptive" effect on her co-workers.[18] Again, there is no evidence in support of this prediction in the record, and some evidence against: Shahar's summer clerkship with the Department appears to have been a success.

Bowers further contends that he was motivated to withdraw Shahar's job offer by the concern that the Department would be perceived by the public as disregarding Georgia law as it pertains to homosexual marriages (which are not recognized) and sodomy (which is illegal).[19] Again, Shahar's commitment ceremony and relationship were not, before the inception of this case, thrust into the public domain.

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[15] Br. of Appellee at 12-13.

[16] Br. of Appellee at 13; Bowers Dep. at 62-63.

[17] Br. of Appellee at 5; Shahar Dep. at 60-61.

[18] Br. of Appellee at 13; Bowers Dep. at 90-91.

[19] The Georgia consensual sodomy statute, O.C.G.A. §16-6-2, which makes oral and anal sex illegal, applies equally to homosexuals and heterosexuals.

Even if members of the public were to become aware of and misunderstand the asserted status of the relationship between Shahar and her partner, it is questionable whether they would infer that the Department, by employing Shahar, was acquiescing in the legally legitimate status of the union. Shahar neither violated Georgia's laws pertaining to marriage nor attempted to avail herself of any legal rights or privileges reserved for legally married people. And there is no evidence that Shahar violated Georgia's sodomy law.[20] Catering to private prejudice is not a legitimate government interest. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448, 105 S.Ct. 3249, 3259, 87 L.Ed.2d 313 (1985)("mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable [by the government], are not permissible bases" for decisionmaking); *Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S.Ct. 1879, 1882, 80 L.Ed.2d 421 (1984)("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

Although the unique status of Bowers' office makes this a close case, I conclude that Shahar's constitutional interest in pursuing her intimate association outweighs any threat to the efficient operation of the Georgia Department of Law.

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[20] Bowers admits that he has no knowledge of Shahar's actual sexual behavior. Bowers Dep. at 69. Instead, in considering whether to withdraw Shahar's job offer, he claims to have relied on "the public perception that 'the natural consequence of a marriage is some sort of sexual conduct' . . . and if it's homosexual, it would have to be sodomy." Brief of Appellee at 10-11; Bowers Dep. at 80-81. The bare description of a person as "homosexual," however, is hardly sufficient to support an inference that he or she has engaged in the specific conduct violative of Georgia's sodomy law. *Cf. Able v. United States*, 880 F.Supp. 968, 976 (E.D.N.Y.1995)("This court concludes that under the First Amendment a mere statement of homosexual orientation is not sufficient proof of intent to commit acts as to justify the initiation of discharge proceedings.").

As the ultimate balancing under *Pickering* is a question of law for this court to decide *de novo*, *Kurtz v. Vickrey*, 855 F.2d 723, 732 (11th Cir. 1988), I would reverse summary judgment in favor of Bowers and grant summary judgment in favor of Shahar on her intimate association claim.

II. Expressive Association

"Expressive" association claims involve the "right to associate for the purpose of engaging in those activities protected by the First Amendment -- speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts*, 468 U.S. at 618, 104 S.Ct. at 3249. The right of expressive association protects communal pursuit of the rights expressly protected by the First Amendment. *Id.* at 618, 622, 104 S.Ct. at 3249, 3252; *McCabe v. Sharrett*, 12 F.3d 1558, 1563 (11th Cir. 1994). In this case, Shahar's commitment ceremony constituted an association for the purpose of, at least in part, engaging in the exercise of religion, a protected First Amendment activity.[21] I agree with the majority that Bowers' withdrawal of Shahar's job offer burdened her right of expressive association.

This court has stated that the *Pickering* balancing test is the correct standard of review when a public employer burdens an employee's First Amendment right of expressive association. *Hatcher v. Board of Public Educ. & Orphanage*, 809 F.2d 1546, 1559 & n.26 (11th Cir. 1987). The majority now determines that *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549, 107 S.Ct. 1940, 1948, 95 L.Ed.2d 474 (1987), overruled *Hatcher* on this point be-

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[21] On the facts of this case, I do not believe that Shahar has stated a viable expressive association claim based on social or political aspects of her commitment ceremony and relationship with her partner. In any case, an association claim based on public expression would be in tension with Shahar's more compelling intimate association claim.

cause the Supreme Court in *Rotary* applied a compelling interest test to the plaintiff's expressive association claim. *Rotary*, however, was not an employment case, and, as explained above, in the employment context the state has "far broader powers than does the government as sovereign." *Waters*, 511 U.S. at ___, 114 S.Ct. at 1886. Because I believe that this court continues to be bound by *Hatcher*, *Pickering*, not strict scrutiny, should be applied in reviewing Shahar's expressive association claim.[22]

"The intrinsic and instrumental features" of expressive and intimate association "may, of course, coincide." *Roberts*, 468 U.S. at 618, 104 S.Ct. at 3249. In this case, as the district court found, Shahar's expressive association claim overlaps not just her intimate association claim but also her free exercise claim. I agree with the district court that Shahar's expressive association claim "offers no greater claim to constitutional protection than [her] intimate association claim," *Shahar*, 836 F.Supp. at 862, given that *Pickering* should be applied to both, and therefore I would not address it any further.

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[22] *Connick*'s public concern requirement does not stand in the way of Shahar's expressive association claim in this circuit. *See Hatcher*, 809 F.2d at 1558 ("We conclude, however, that *Connick* is inapplicable to freedom of [expressive] association claims."). Other circuits have applied the *Connick* requirement to expressive association claims. *See Griffin v. Thomas*, 929 F.2d 1210, 1212-14 (7th Cir. 1991); *Boals v. Gray*, 775 F.2d 686, 691-93 (6th Cir. 1985); *see also Clark v. Yosemite Community College Dist.*, 785 F.2d 781, 791 (9th Cir.1986)(noting that because defendant had not raised the question, the court had no need to decide whether the plaintiff's "right of association with the union touches on a matter of public concern so as to give rise to a cause of action in federal court for a violation of First Amendment rights").

III. Free Exercise of Religion

I would not remand for reconsideration on the free exercise claim. Rather, because in my view this case is not about the free exercise of religion, and because the violation of Shahar's intimate association rights is dispositive, I would not reach this issue.

IV. Equal Protection

Shahar's equal protection claim is based on the contention that Bowers withdrew her job offer, at least in part, because she is a homosexual. Shahar argues that classifications based on sexual orientation should be subject to strict scrutiny under the Equal Protection Clause.[23]

The facts of this case, however, do not support Shahar's

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[23] Judge Godbold would hold that strict scrutiny applies to Shahar's equal protection claim because Shahar's fundamental right of free exercise of religion has been burdened. This equal protection analysis is both flawed and superfluous. Shahar does not argue, and the record does not indicate, that she was treated differently because of her religion. *See, e.g., Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1993)("To establish an equal protection clause violation, a plaintiff must demonstrate that a challenged action was motivated by an intent to discriminate.")(citing *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 238-48, 96 S.Ct. 2040, 2047- 52, 48 L.Ed.2d 597 (1976)). Nor did Bowers *classify* employees in the manner contemplated by equal protection principles. *See, e.g., Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 2331, 120 L.Ed.2d 1 (1992)(stating the general equal protection principle that rational basis review applies "unless a *classification* warrants some form of heightened review because it jeopardizes exercise of a fundamental right or *categorizes* on the basis of an inherently suspect characteristic")(emphasis added). Moreover, even if Shahar could make out an equal protection claim based on her fundamental right of free exercise, this claim would be subsumed by her direct free exercise claim; no greater constitutional protection would result.

contention that Bowers withdrew her offer because of her sexual orientation.[24] Bowers asserted that he withdrew Shahar's job offer only because of conduct surrounding her commitment ceremony and relationship with her partner, not because of her status as a homosexual. The record establishes that the Department has neither a policy nor a proven practice of excluding homosexuals from employment, and that Bowers generally does not inquire into the sexual practices or preferences of applicants and employees. Furthermore, a number of Department employees, including at least two in management positions (but not, apparently, Bowers himself), were aware that Shahar was a lesbian when the offer of employment was extended. Although Shahar offers some indirect evidence of divergent attitudes in the Department towards homosexuals and heterosexuals, she has not shown that she was treated differently, for equal protection purposes, on the basis of sexual orientation.[25] Her equal protection claim thus fails.

Accordingly, I CONCUR in part and DISSENT in part.

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[24] Shahar further argues that disputed issues of material fact should have precluded summary judgment. After reviewing the record, however, I agree with the district court that the pertinent facts are undisputed.

[25] Thus, we need not reach the issue of whether homosexuals constitute a suspect class entitled to strict scrutiny for equal protection claims.

Robin Joy SHAHAR,

v.

Michael J. BOWERS.
No. 1:91-CV-2397-RCF.

United States District Court,
N.D. Georgia,
Atlanta Division.
Oct. 7, 1993.

ORDER

RICHARD C. FREEMAN, Senior District Judge.

This action is before the court on plaintiff Robin Joy Shahar's motion for partial summary judgment [# 34-1] and defendant Michael J. Bowers' motion for summary judgment [# 35-1]. Both motions are opposed.

BACKGROUND

The undisputed facts are as follows. Plaintiff attended Emory Law School from 1988-91, served as an editor of the Emory Law Review, and graduated sixth in her class. In the summer of 1990, plaintiff worked as a law clerk for the Georgia Department of Law [the Department]. After this clerkship, defendant offered plaintiff a permanent position as a Department attorney commencing in the fall of 1991. Plaintiff accepted this offer. Plaintiff's Statement of Facts, ¶¶3, 4, 8, 10.

In the fall of 1990, following her acceptance of defendant's employment offer, plaintiff completed a standard Department personnel form. In the "family status" section of this form,[26] she recorded her marital status as engaged,

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[26] The Department includes this section to elicit information in connec-
(continued...)

listed her future spouse as Francine Greenfield, and noted that Ms. Greenfield worked for a state of Georgia employer. See generally Exhibit A to Plaintiff's Motion for Partial Summary Judgment. The Department received this form in November of 1990 and filed it without fully reviewing the document. Plaintiff's Statement of Facts, ¶44.

Months later, in mid-June, 1991, plaintiff telephoned Deputy Attorney General Bob Coleman [Coleman] to discuss her upcoming employment. Coleman asked whether plaintiff could begin work in mid-September. Plaintiff stated that she would prefer to begin work later in the month, in light of her upcoming wedding. Plaintiff did not inform Coleman that her marriage would be to another woman, but did state that she would be changing her last name from Brown to Shahar. Plaintiff and Coleman also discussed plaintiff's division assignment. Plaintiff's Statement of Facts, ¶¶48, 49; Defendant's Statement of Facts, ¶25; Coleman Deposition, at 31-33.

Shortly after this conversation, Coleman mentioned plaintiff's upcoming wedding to Senior Assistant Attorney General Jeffrey Milsteen [Milsteen]. Milsteen subsequently learned from Susan Rutherford [Rutherford], a Department attorney, that plaintiff's planned marriage would be to another woman. Coleman Deposition, at 39-41; Milsteen Deposition, at 57-60.

Defendant was away from the office at this time, and learned of plaintiff's wedding plans upon his return. Coleman Deposition, at 51-52. Discussions between defendant and his staff regarding plaintiff's wedding plans ensued. The information relayed to defendant during these conversations

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[26] (...continued)
tion with potential conflicts of interest. Plaintiff's Statement of Facts, ¶41.

included: (1) plaintiff's personnel form, (2) Coleman's summary of his phone conversation with plaintiff, (3) information of unspecified origin that plaintiff planned to send or had already sent invitations to the ceremony (and that some Department staff appeared on the invitation list), (4) information of unspecified origin that the planned ceremony would be large and/or take place in a church, and (5) information that Rutherford and another Department employee had seen plaintiff at a restaurant in the spring of 1991, at which time plaintiff informed them that she and her female dinner companion were preparing for their upcoming wedding. Plaintiff's Statement of Facts, ¶¶47, 58; Defendant's Statement of Facts, ¶24.

Coleman requested plaintiff's presence in his office on July 10, 1991. At this meeting, Coleman handed plaintiff a letter from defendant. The letter stated that defendant felt it necessary to withdraw his offer of employment based upon "information which [had] only recently come to [his] attention relating to a purported marriage between [plaintiff] and another woman." Defendant's Statement of Facts, ¶26; Plaintiff's Statement of Facts, ¶¶51, 53.

Plaintiff asserts that defendant's withdrawal of his offer of employment unconstitutionally violated her rights to freedom of association, freedom of religion, equal protection of the law, and substantive due process of law. She requests declaratory and injunctive relief, including reinstatement. She also seeks compensatory damages and punitive damages from defendant in his individual capacity. *See generally* Amended Complaint, ¶¶36- 58.

DISCUSSION

I. Standard for Summary Judgment

Under Fed.R.Civ.P. 56 the court should grant a motion for summary judgment where "there is no genuine issue as to any material fact and . . . the moving party is entitled to

judgment as a matter of law." The movant carries his burden by showing the court that there is "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). As the Eleventh Circuit has explained, "[o]nly when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). The nonmovant is then required "to go beyond the pleadings" and present competent evidence in the form of affidavits, depositions, admissions and the like, designating "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 334, 106 S.Ct. at 2553. Generally, "[t]he mere existence of a scintilla of evidence" supporting the nonmovant's case is insufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986). The court, resolving all reasonable doubts in favor of the nonmovant, must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Id.*

II. The Parties' Cross-Motions for Summary Judgment on Plaintiff's Freedom of Association Claims

The Supreme Court has recognized two types of associations as constitutionally protected from unjustified government interference: intimate and expressive. *Roberts v. United States Jaycees*, 468 U.S. 609, 618, 104 S.Ct. 3244, 3249, 82 L.Ed.2d 462 (1984). An "expressive" association involves the right to meet with others in order to pursue First Amendment freedoms, including freedom of religion. An "intimate" association consists of a personal relationship "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain

the affiliation, and seclusion from others in critical aspects of the relationship." *Id.*, 468 U.S. at 618, 104 S.Ct. at 3250 (citations omitted).

Plaintiff argues as a matter of law that defendant's decision to withdraw his employment offer imposed an unconstitutional burden on: (1) her right to intimate association with her female partner, (2) her right to expressive association with her female partner for religious purposes, and (3) her right to expressive association with friends, family, and members of her religious community for the purpose of celebrating her wedding. The court will analyze plaintiff's first two arguments as asserting a single intimate association claim. The court will not analyze plaintiff's third argument at this juncture because it: (1) overlaps plaintiff's free exercise claim, and (2) offers no greater claim to constitutional protection than plaintiff's intimate association claim.

a. Plaintiff's Right to Intimate Association

The Eleventh Circuit has adopted an expansive view of the right to freely associate with others. *See Sawyer v. Sandstrom*, 615 F.2d 311 (5th Cir. 1980)[27] (right to free association includes a general right to meet with whomever one chooses, even if such association is not for expressive purposes); *see also Wilson v. Taylor*, 733 F.2d 1539 (11th Cir. 1984)(city's decision to fire a police officer for dating the daughter of a convicted felon implicated the officer's right to free association)(citing *Sawyer*).[28]

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[27] All decisions of the former Fifth Circuit decided prior to October 1, 1981 are binding precedent for the Eleventh Circuit. *Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc).

[28] *Sawyer* and *Wilson*, both decided before *Roberts*, do not speak in terms of "intimate" and "expressive" association. The court recognizes that *Wilson* has been faulted for blurring the distinction between

(continued...)

In asserting that her relationship with her female partner constitutes a constitutionally-protected association, plaintiff points to evidence that her wedding ceremony signifies a lifetime commitment which cannot end unless formally dissolved within her religion. *See* Plaintiff's Statement of Facts, ¶79, and Defendant's Response (offering no evidence to the contrary). The court agrees that such a relationship is entitled to constitutional protection.

The court's holding is not affected by defendant's assertion that plaintiff's association with her female partner merits no constitutional protection because it "does not involve a heterosexual relationship connected with (or simulating) creating or maintaining a family." Brief in Support of Defendant's Motion for Summary Judgment, at 47. The court need not resolve the parties' debate over the definition of "family" to determine whether plaintiff's relationship with her female partner constitutes a protected association. Family or quasi-family relationships "exemplify" the considerations which underlie the constitutional protection extended to intimate association. *See Roberts*, 468 U.S. at 618, 104 S.Ct. at 3250. Family and quasi-family relationships do not, however, constitute the only relationships protected by the right to intimate association. *Id.* at 620, 104 S.Ct. at 3251 (between the poles of familial affiliations and large business enterprises "lies a *broad range* of human relationships that may make greater and lesser claims to constitutional protec-

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[28] (...continued)
expressive and nonexpressive association. *See, e.g., Swank v. Smart*, 898 F.2d 1247, 1251 (7th Cir. 1990), *cert. denied*, 498 U.S. 853, 111 S.Ct. 147, 112 L.Ed.2d 113 (1990)(associations for purposes other than expression are more properly viewed as stemming from the Fourteenth Amendment right to substantive due process rather than from the First Amendment). However, this debate is irrelevant to the case at bar because plaintiff's intimate association with her female partner also includes religious expression protected by the First Amendment.

tion from particular incursions by the State")(emphasis added). Based upon the reasoning of *Roberts*, *Wilson*, and *Sawyer*, the court finds as a matter of law that plaintiff's relationship with her female partner constitutes a constitutionally protected intimate association.

Defendant next argues that even if plaintiff's relationship constitutes a protected association, he did not burden that association because he withdrew his employment offer on the basis of a "particular activity" pursued in the course of plaintiff's association. *See* Brief in Support of Defendant's Motion for Summary Judgment, at 48. Defendant borrows this argument from cases in which defendant employers, apart from any concern with a plaintiff employee's sexual orientation, objected to certain conduct by the plaintiff employee. *See, e.g.*, Naragon v. Wharton, 572 F.Supp. 1117, 1122 (M.D.La.1983)(university could constitutionally reassign graduate student from a teaching to a research position based upon concern with her involvement in "a 'deep, personal romantic relationship' with a student, whether that relationship was homosexual or heterosexual"), *aff'd*, 737 F.2d 1403 (5th Cir. 1984). Here, plaintiff's conduct ("holding herself out" as about to marry another woman) is not sufficiently separate from her intimate association (marrying another woman) to allow a finding that this association was not burdened. The court also disagrees with defendant that plaintiff was "free" to pursue her intimate association after the withdrawal of defendant's offer of employment. Instead, the court finds that plaintiff pursued her desired association only at the price of her desired employment. Thus, the question before the court is whether defendant justifiably imposed that price.

b. Plaintiff's Right to Intimate Association as Compared to Defendant's Asserted Interests

The parties vigorously contest the applicable legal

standard for determining whether defendant has unjustifiably burdened plaintiff's right to intimate association. Plaintiff contends that any state intrusion on an individual's freedom of association must be narrowly tailored to serve a compelling government interest. Brief in Support of Plaintiff's Motion for Partial Summary Judgment, at 36. However, the court agrees with defendant that, because this case stems from a government employment decision, a different analysis applies.

In *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734- 35, 20 L.Ed.2d 811 (1968), the Supreme Court confirmed that, absent sufficient cause, a public employer may not constitutionally compel one of its employees to relinquish a constitutional right as a condition of employment. The *Pickering* Court recognized, however, that a state's interest in regulating the constitutionally protected activity of its employees differs significantly from its interest in regulating the activity of its citizenry in general. Thus, the Court held that when a public employer infringes upon a constitutionally-protected right, the constitutionality of the employer's action turns upon a balancing between the employee's asserted interest and the employer's interest in the efficient delivery of public services.

Though *Pickering* involved the right to free speech, the Eleventh Circuit has applied its balancing test to cases involving other constitutional rights. *See Stough v. Crenshaw County Board of Education*, 579 F.Supp. 1091, 1096 (M.D. Ala.1983)(fundamental parental rights of teachers to educate their children as they see fit must be specially evaluated in light of their status as public school teachers, and balanced against school board's assertion that the efficient operation of public schools requires teachers to refrain from sending their children to private school), *aff'd*, 744 F.2d 1479, 1481 (11th Cir. 1984)(citing with approval the district court's application of the *Pickering* balancing test); *see also Hatcher*

v. Board of Public Education, 809 F.2d 1546, 1559 (11th Cir. 1987)(directing district court to apply the *Pickering* balancing test on remand to determine whether plaintiff's right to expressive association outweighed defendant's asserted interest in promoting the efficient operation of its schools).

Once all disputed facts are resolved, the ultimate balancing under *Pickering* is a question of law for the court. *Kurtz v. Vickrey*, 855 F.2d 723, 732 (11th Cir. 1988). Here, the court need not resolve any issues of disputed fact, as each party relies upon undisputed facts in arguing for the entry of judgment as a matter of law on plaintiff's free association claim. After carefully weighing the undisputed facts, the court finds that the balance of interests tips in favor of defendant's assertions regarding the efficient operation of the Department.

Defendant's asserted interests embody two over-arching concerns: (1) public credibility, specifically the need to avoid the appearance of endorsing conflicting interpretations of Georgia law, and (2) internal efficiency, specifically the need to employ attorneys who act with discretion, good judgment, and in a manner which does not conflict with the work of other Department attorneys. *See* Brief in Support of Defendant's Motion for Summary Judgment, at 15-17; *see also* Defendant's Deposition, at 42-47, 90-91.[29] Plaintiff contends that her employment at the Department following her marriage and her acknowledgments of that

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[29] "Early on you asked me why I withdrew the offer and I told you two reasons: the credibility -- I was concerned about the credibility of the office . . . and the ability to handle the kinds of cases that would come up in the office . . . . [A] third underlying reason was because if we had hired Ms. Shahar, given this marriage, even if she were not going to handle the cases, the fact that she might be perceived as taking or making a statement contrary to what some of the other lawyers had to do in defending this or that law or this or that position . . . would be highly disruptive." Defendant's Deposition, at 90-91.

marriage would have posed no significant threat to either of these overarching concerns. The court disagrees.

First, the court finds that defendant has advanced sufficient evidence to establish that members of the general public could eventually learn of plaintiff's union to her female partner. Plaintiff maintains that the union was private. However, she informed Rutherford, a future colleague, of her planned wedding. *See* Defendant's Statement of Facts, ¶24, and Plaintiff's Response (conceding this representation). Plaintiff also informed an unspecified Department employee or employees that she was sending invitations to a fairly large number of individuals. *See* Plaintiff's Statement of Facts, ¶58 (stating that defendant had heard prior to withdrawing his offer that plaintiff had planned a large wedding and had sent or would send invitations to some Department employees), and Defendant's Response (admitting this fact). Plaintiff also informed Deputy Attorney General Coleman, with whom she had no acquaintance, that she planned to marry before beginning work. *See* Defendant's Statement of Facts, ¶25, and Plaintiff's Response (conceding that she represented to Coleman that she would be getting married and changing her last name); *see also* Plaintiff's Statement of Facts ¶46 (stating that she and Coleman "did not know one another") and Defendant's Response (admitting this fact). Finally, plaintiff indicated on her personnel form that she would be marrying a woman. *See* Defendant's Statement of Facts, ¶22, and Plaintiff's Response (not disputing that in filling out her personnel form she listed her marital status as engaged and also noted that her future spouse was a woman). These undisputed facts support defendant's contention that plaintiff's upcoming marriage and her representations regarding this marriage were public and not private in nature.

Second, the court finds sufficient evidence that members of the public could view defendant as acting inconsist-

ently if he employed plaintiff but also argued in various types of cases that homosexual unions: (1) carry no legal benefits, and (2) do not carry the right to engage in consensual sodomy. While plaintiff's union violated no Georgia law, defendant correctly points out that Georgia law does not recognize same-sex marriages. Defendant also emphasizes that use of the term "spouse" in numerous sections of the Georgia Code does not include same-sex unions. Further, defendant offers undisputed evidence that the suspected sexual conduct of Department attorneys can be called into public question. Defendant emphasizes that in a recent Department case involving a heterosexual couple who engaged in consensual sodomy, opposing counsel sought to disqualify all Department attorneys who had violated the sodomy law. *See* Response to Plaintiff's Motion for Partial Summary Judgment, at 25; *see also* Exhibit B to Defendant's Motion for Summary Judgment. The record contains no indication that any Defendant attorney involved in this case engaged in any conduct even suggesting a violation of the sodomy law. Nonetheless, the conduct of Department attorneys was publicly challenged. This incident supports defendant's assertion that the efficient and credible operation of the Department requires attorneys to refrain from any conduct which appears improper or inconsistent with Department efforts in enforcing Georgia law.

Finally, the court finds that defendant has sufficiently supported his asserted concern regarding plaintiff's discretion and good judgment. In affidavit testimony of two Department attorneys who were scheduled to supervise plaintiff, an attorney testified that, in her opinion, plaintiff's representations regarding her upcoming marriage demonstrated that plaintiff "was either unaware of the nature of the work . . . [done] at the Department of Law, particularly the [in] Criminal Division, or that [plaintiff] was not concerned about the sensitivities involved in working for the Depart-

ment." Exhibit B to Response to Plaintiff's Motion for Partial Summary Judgment (Affidavit of Senior Assistant Attorney General Mary Beth Westmoreland, ¶5). The other attorney's testimony emphasized that Department attorneys largely operate "in a fish bowl" and, therefore, must take great pains to refrain from conduct which could be interpreted as contrary to a Department position on a particular issue. Exhibit A to Response to Plaintiff's Motion for Partial Summary Judgment (Affidavit of Criminal Division Attorney Paula Smith, ¶3).

Finding sufficient evidentiary support for defendant's articulated concerns regarding plaintiff's employment with the Department (given her planned marriage and representations regarding that marriage), and finding no evidentiary rebuttal sufficient to dispute these concerns, the court concludes that the unique circumstances of this case show that defendant's interests in the efficient operation of the Department outweigh plaintiff's interest in her intimate association with her female partner. Thus, the court denies plaintiff's motion for summary judgment on her free association claim and grants defendant's motion for summary judgment on this claim.

III. The Parties' Cross-Motions for Summary Judgment on Plaintiff's Free Exercise Claim

Plaintiff emphasizes that her decision to marry her female partner was motivated in part by a sincerely held religious belief, and that both her religious community (a synagogue in the Reconstructionist Movement of American Judaism) and her rabbi supported this decision. *See generally* Plaintiff's Statement of Facts, ¶¶14-18, 23-24, 33-34. Thus, plaintiff contends that defendant burdened the free exercise of her religion when he withdrew his offer of employment. Plaintiff again contends that defendant's action was unconstitutional because it was not taken pursuant to a narrowly tailored, compelling government interest.

Defendant responds that plaintiff's claim fails at the outset in light of the Supreme Court's ruling in *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). In *Smith*, the Supreme Court held that two members of the Native American Church who used peyote for religious purposes could not assert a free exercise challenge to secure an exemption from a generally applicable criminal statute which prohibited the possession of controlled substances. *Id.*, 494 U.S. at 876, 110 S.Ct. at 1599. Because the case at bar involves an office policy[30] and not a religion-neutral, generally applicable criminal statute, the court finds much of *Smith*'s reasoning inapplicable.

However, the court does find *Smith* relevant to the extent that it places sharp limits on the compelling interest test articulated in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and advanced by plaintiff. *Sherbert* involved a Seventh-day Adventist Church member who was discharged for her unwillingness to work on Saturday (her Sabbath Day) and was subsequently denied unemployment compensation for her refusal to accept "suitable work." The *Sherbert* Court held that the church member's ineligibility for benefits stemmed directly from her religious practices and, therefore, indirectly burdened the free exercise of her religion. The Court held such a burden justifiable only on the basis of a compelling government interest which could not be satisfied by other means, and found that the state defendant had advanced no such interest. 374 S.Ct. at 403-05, 83 S.Ct. at 1794-95. The *Smith* Court, without

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[30] "Department employees may not conduct themselves in ways that are inconsistent with state law, publicly take positions that are inconsistent with the stance taken by the Department of Law, or conduct themselves in ways that undermine the credibility of the Attorney General's Office." Response to Plaintiff's Motion for Partial Summary Judgment, at 13-14.

overruling *Sherbert*, strongly questioned the continued viability of *Sherbert*'s compelling interest test beyond the realm of unemployment compensation cases. *See Smith*, 494 U.S. at 883, 110 S.Ct. at 1603; *see also Church of Scientology Flag Service Org., Inc. v. City of Clearwater*, 2 F.3d 1514 (11th Cir. 1993)(citing *Smith*). Thus, the court declines to apply *Sherbert* to the case at bar.

The balance of cases cited by both plaintiff and defendant do not discuss what legal test applies where a government *employment* decision results in an asserted indirect burden on the free exercise of a public employee's religion. Thus, in the absence of clear guidance to the contrary, the court concludes that the *Pickering* balancing test applies to plaintiff's free exercise claim. Assuming without deciding that defendant indirectly burdened plaintiff's right to freely exercise her religion, the court finds that any burden suffered by plaintiff was justified in light of the above-discussed unique governmental concerns involved in the efficient operation of the Department. Accordingly, the court grants defendant's motion for summary judgment on plaintiff's free exercise claim and denies plaintiff's motion for summary judgment on this claim.

IV. Defendant's Motion for Summary Judgment on Plaintiff's Equal Protection Claim

Plaintiff contends that when defendant withdrew his offer of employment based upon her marriage to another woman, he violated her right to equal protection of the law by acting with the intent to discriminate against her on the basis of her sexual orientation. Amended Complaint, ¶47. In response, defendant contends that he had no such discriminatory intent.

The Equal Protection Clause of the Fourteenth Amendment obligates a state, through its officials, to treat similarly situated persons in a similar manner. It forbids the applica-

tion of a legitimate, fair policy in an uneven manner. *Yick Wo v. Hopkins*, 118 U.S. 356, 373, 6 S.Ct. 1064, 1073, 30 L.Ed. 220 (1886). Its mandate is violated when an official draws distinctions regarding similarly situated persons without fairly grounding the distinctions in a legitimate government objective. *Zeigler v. Jackson*, 638 F.2d 776, 779 (5th Cir. 1981). However, a successful equal protection claim requires a showing that the challenged action was undertaken with an intentionally discriminatory purpose. *Washington v. Davis*, 426 U.S. 229, 239-42, 96 S.Ct. 2040, 2047-49, 48 L.Ed.2d 597 (1976). Proof of discriminatory intent violative of the Equal Protection Clause requires more than a showing that a government actor was merely aware, or could have foreseen, that an action would adversely affect on a particular classification of persons. Instead, a plaintiff must show "that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979).

Defendant argues that the withdrawal of his offer was motivated by neither plaintiff's classification as a homosexual nor by an intent to discriminate against plaintiff on the basis of her sexual orientation. Defendant asserts that, rather than basing his decision merely on plaintiff's sexual orientation, he withdrew the offer because plaintiff "held herself out as 'getting married' to another woman, an arrangement that is inconsistent with Georgia law." Brief in Support of Defendant's Motion for Summary Judgment, at 25. To support the contention that he does not discriminate against homosexuals as a general class, he points to deposition testimony indicating that: (1) he has never inquired as to the sexual orientation of a Department employee, (2) he would never exclude a homosexual from employment solely

on the basis of his or her sexual orientation, (3) he in the past refused to inquire into the sexual orientation of an allegedly homosexual attorney accused of abusing his position as a Department attorney to protect a same-sex lover, and (4) when he extended plaintiff an offer of employment, he had constructive knowledge of plaintiff's sexual orientation through plaintiff's disclosures to various Department employees. Brief in Support of Defendant's Motion for Summary Judgment, at 24- 25. Such evidence indicates a lack of discriminatory intent and meets defendant's summary judgment burden by showing that no factual dispute exists as to his nondiscriminatory intent.

In response, plaintiff argues that defendant "implausibly attempts to show that [p]laintiff's sexual orientation played no role in his decision to fire her, and thus that she has not made out the basic elements of an equal protection claim." Response to Defendant's Motion for Summary Judgment, at 35. She asserts that defendant's allusion to her relationship with another woman in his termination letter, and in each of his explanations for writing this letter, will establish at trial that this case "involves a government classification," namely, sexual orientation. *Id.*, at 36. She further argues that at trial she can present evidence indicating that defendant acted, at least in part, with the specific intent to discriminate against her on the basis of her sexual orientation. *Id.*, at 38.[31]

The court disagrees that the evidence cited by plaintiff

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[31] Plaintiff also presents arguments and evidence comparing herself to married heterosexual Department attorneys, whom plaintiff emphasizes are allowed to reveal their family status without repercussions. Because heterosexual marriages are recognized by state law and plaintiff's marriage is not, plaintiff and married heterosexual Department attorneys are not similarly situated. Thus, these arguments do not advance plaintiff's equal protection claim.

could establish that defendant acted on the basis of a "classification" consisting of homosexual persons. It is true, of course, that defendant's mention of plaintiff's relationship with another woman exhibits an awareness of plaintiff's sexual orientation. However, each of defendant's justifications emphasize and depend upon plaintiff's planned *marriage* to another woman and her acknowledgement of that marriage to others. Thus, defendant's "classification" -- if any -- is not based on mere sexual orientation, but on sexual orientation *plus* conduct viewed by defendant as inconsistent with state law and Department efforts in applying state law.

Further, even if plaintiff could establish that defendant acted at least in part based upon plaintiff's "classification" as a homosexual, she has failed to point to specific facts which could establish that defendant withdrew his offer with a purposeful intent to discriminate on the general basis of sexual orientation -- *i.e.*, that defendant withdrew the offer "because of" plaintiff's orientation rather than "in spite of" that orientation. In this vein, plaintiff argues that defendant's intent to purposefully discriminate is evidenced by the impact of his decision, his justifications for his decision, and the fact that he came to his decision "quickly and as a result of very little information." Response to Defendant's Motion for Summary Judgment, at 38.[32] The court finds that the evidence proffered in support of these arguments, viewed in a light most favorable to plaintiff, fails to raise a genuine issue of fact as to whether defendant acted with an impermissible intent. Plaintiff's evidence fails to rebut, and for the most part even fails to respond to, defendant's evidence regarding his attitude towards and treatment of homosexuals generally. Thus, plaintiff's evidence could not convince a reasonable fact-finder that defendant withdrew his

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[32] Plaintiff supports these assertions by alluding to facts cited earlier in her response brief at 2-13 and/or 14-35.

decision in whole or in part based on an intent to discriminate against plaintiff on the basis of her sexual orientation. Accordingly, the court grants defendant's motion for summary judgment on plaintiff's equal protection claim.

V. Defendant's Motion for Summary Judgment on Plaintiff's Substantive Due Process Claim

In addition to her other constitutional claims, plaintiff asserts a "distinct cause of action that stems from the Attorney General's arbitrary employment decision." Response to Defendant's Motion for Summary Judgment, at 68 n.52. She contends that the arbitrary nature of defendant's decision "deprived [her] of her right to substantive due process, as protected by the Fourteenth Amendment to the United States Constitution, in violation of 42 U.S.C. §1983." Amended Complaint, ¶55.

As the Eleventh Circuit has recently held: The current test in this circuit as to whether there has been a violation of substantive due process in the context of §1983 is twofold. First, it must be determined whether there has been a deprivation of a federal constitutionally protected interest, and secondly, whether the deprivation, if any, is the result of an abuse of governmental power sufficient to raise an ordinary tort to the statute of a constitutional violation [*i.e.*, an arbitrary and capricious action]. *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1374 (11th Cir. 1993)(quoting *Rymer v. Douglas County*, 764 F.2d 796, 801 (11th Cir. 1985)).

Plaintiff correctly argues that the right to substantive due process protects individuals from abusive government power. *See Rymer*, 764 F.2d at 802 n.4; *see also Thompson v. Gallagher*, 489 F.2d 443, 447 (5th Cir. 1973) ("The Fourteenth Amendment stands for the proposition that the government must act, when it acts, in a manner that is neither arbitrary nor unreasonable."). However, *Corn* and *Rymer*

emphasize that this protection is triggered by the deprivation of a federally protected interest, such as plaintiff's asserted rights to free association and the free exercise of her religion. Aside from these two federally protected interests, plaintiff advances no additional interest in support of her allegedly separate substantive due process claim. She has conceded from the outset that she had no property interest in the employment promised to her. Further, her response to defendant's motion for summary judgment fails to address defendant's contention that the withdrawal of his offer did not deprive plaintiff of a liberty interest. Plaintiff, therefore, cannot allege a "distinct cause of action that stems from the Attorney General's arbitrary employment decision." Thus, the court grants defendant's motion for summary judgment on plaintiff's separately-asserted right to substantive due process. To the extent that plaintiff's substantive due process claim overlaps her freedom of association and free exercise claims, it is also subject to summary judgment in favor of defendant in light of the above-outlined analysis of each of these claims.

VI. Defendant's Assertion of Qualified Immunity

Because defendant is entitled to summary judgment on each count of plaintiff's Amended Complaint, the court need not reach defendant's arguments regarding his asserted immunity from plaintiff's request for compensatory and punitive damages.

CONCLUSION

For the reasons outlined above, plaintiff Robin Joy Shahar's motion for partial summary judgment [# 34-1] is DENIED and defendant Michael J. Bowers' motion for summary judgment [# 35-1] is GRANTED. The Clerk is DIRECTED to enter judgment in favor of defendant on all counts and to DISMISS this action.

SO ORDERED.